

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 30, 2009
CERTIFIED MAIL

NOTICE OF DECISION
PARTY

[REDACTED]

REASON FOR HEARING

On June 11, 2009, the appellant, [REDACTED], through her attorney-in-fact, Julianne Graff, 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 assets for less than fair market value.

A hearing was held July 20, 2009, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-184 of the Connecticut General Statutes. The hearing record closed August 3, 2009.

PRESENT AT HEARING

[REDACTED], appellant's attorney-in-fact (daughter)
[REDACTED], appellant's witness (son-in-law)
Anne Collord, appellant's consultant
Shelley Starr, Department's representative
Robley Newton, Department's witness
Eva Tar, hearing officer

STATEMENT OF ISSUE

The issue of this hearing is whether the whether the appellant's Medicaid case is subject to a penalty period of ineligibility for payment of long-term care services.

FINDINGS OF FACT

1. The appellant was born November 15, 1928. (Dept. Ex. T: [Fax], 7/22/09)
2. The appellant has a history of dementia. (Dept. Ex. F: [Correspondence], 1/15/09)

3. On February 23, 2007, the appellant assigned power of attorney to [REDACTED] (Dept. Ex. C: *Statutory Short Form Power of Attorney*, signed 2/23/07)
4. [REDACTED] is the appellant's daughter. (Appellant attorney-in-fact testimony)
5. Prior to August 27, 2007, the appellant owned property located at [REDACTED], [REDACTED] Connecticut. (Dept. Ex. R: Fair Hearing-Addendum, 7/20/09)
6. On August 27, 2007, the appellant's attorney-in-fact sold the appellant's property for \$246,000.00 to a third party. (Dept. Ex. R)
7. The appellant netted \$227,634.68 from the sale of her property on August 27, 2007. (Department summary, 7/14/09)
8. The appellant began to reside in the home of her attorney-in-fact in August 2007. (Appellant attorney-in-fact testimony)
9. In November and December 2007, the appellant made three payments for a total of \$8,075.00 to Martin Cabinets for new kitchen cabinets in her attorney-in-fact's home. (Dept. Ex. C: *Worksheet for Transfers*, undated)(Appellant attorney-in-fact testimony)
10. On December 26, 2007, the appellant and her attorney-in-fact signed an agreement where the attorney-in-fact stated that in exchange for the proceeds of the sale of the appellant's property, she would provide the following services to the appellant: transportation to medical appointments; purchase and delivery of groceries and meals; light housework; weekly laundry; and safe and open access to the section of the home in which the appellant resided. (Dept. Ex. G: *Family Care Agreement*, signed 12/26/07)
11. The appellant's attorney-in-fact provided services to the appellant while the appellant was residing in the attorney-in-fact's home that were consistent with homemaker services associated with preventing the institutionalization of an individual. (Department representative testimony)(Dept. Ex. F)
12. On November 4, 2008, the Hospital of Central Connecticut-Bradley Memorial admitted the appellant. (Dept. Ex. T)
13. On November 7, 2008, the Hospital of Central Connecticut-Bradley Memorial discharged the appellant to [REDACTED], a skilled nursing facility. (Dept. Ex. T)
14. The appellant's medical condition on November 7, 2008 was acute bronchitis, yeast in the urine, dementia, acute L1 compression fracture, generalized weakness, and a cyst in the kidneys. (Dept. Ex. T)
15. The appellant received the acute L1 compression fracture after falling down the stairs in her attorney-in-fact's home. (Dept. Ex. T)
16. On November 19, 2008, the appellant's attorney-in-fact filed an application on the appellant's behalf for Medicaid coverage of long-term care services. (Dept. Ex. T)

17. At the time of the appellant's application for Medicaid coverage of long-term care services, the average cost of care for an individual residing in a skilled nursing facility in Connecticut equaled \$9,464.00 per month. [UPM P-3029.30]
18. On February 16, 2009, the appellant transferred to [REDACTED], a skilled nursing facility. (Department summary, 7/14/09)(Dept. Ex. B: Institution-INST, as of 7/14/09)
19. In March 2009, the appellant's countable assets for the purposes of the Medicaid program were less than \$1,600.00. (Department summary)
20. On April 14, 2009, the Department issued notices to the appellant stating that the agency had determined that the uncompensated value of the appellant's transfers equaled \$123,530.68 and \$8,075.00. (Dept. Ex. M: *Transfer of Assets: Preliminary Decision Notice*, 4/14/09)
21. On April 14, 2009, the Department valued the homemaker services provided by the appellant's attorney-in-fact to the appellant to equal \$104,104.00, or 11 months at \$9,464.00 per month. (Dept. Ex. M)
22. On May 20, 2009, the Department issued notice to the appellant stating that the agency had determined that the appellant had transferred a total of \$131,605.68 to become eligible for Medicaid, imposing a penalty period of ineligibility for long-term care benefits from March 1, 2009 through April 27, 2010. (Dept. Ex. O: *Transfer of Assets: Final Decision Notice*, 5/20/09)
23. As of July 20, 2009, the appellant had not returned to her attorney-in-fact's home to reside or had been placed in a non-institutionalized setting. (Appellant attorney-in-fact testimony)

RELEVANT STATE STATUTES

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

Conn. Gen. Stat. §17b-262 provides in part that the Commissioner may make such regulations as are necessary to administer the medical assistance program.

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

authorized to make such disposition pursuant to a power of attorney or other person so authorized by law shall be attributed to such applicant, recipient or spouse.

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

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

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

Conn. Gen. Stat. §17b-261a(c) states that the Commissioner may waive the imposition of a penalty period when the transferor (1) in accordance with the provisions of section 3025.25 of the department's Uniform Policy Manual, suffers from dementia at the time of application for medical assistance and cannot explain transfers that would otherwise result in the imposition of a penalty period; or (2) suffered from dementia at the time of the transfer; or (3) was exploited into making such a transfer due to dementia. Waiver of the imposition of a penalty period does not prohibit the establishment of a debt in accordance with subsection (b) of this section.

RELEVANT STATE REGULATIONS

Uniform Policy Manual (UPM) 3000.01 provides definitions:

Compensation is all money, notes, real or personal property, food, shelter, or services received in exchange for something of value.

Legally enforceable agreement is a binding and credible arrangement, either oral or written, wherein two or more parties agree to an arrangement in consideration of the receipt of money, property, or services and in which all parties can be reasonably expected to fulfill their parts of the agreement.

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

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

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

UPM 3029.05(C) provides that the look-back date for transfers of assets is a date that is 60 months before the first date on which both the following conditions exist: the individual is institutionalized and the individual is either applying for or receiving Medicaid.

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

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

UPM 3029.05(F) provides in part that the length of the penalty period is determined by dividing the total uncompensated value of all assets transferred on or after the look-back date by the average monthly cost to a private patient for long-term care services in Connecticut. Once the Department imposes a penalty period, the penalty runs without interruption, regardless of any changes to the individual's institutional status.

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

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

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

UPM 3029.10(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. If only part of the transferred asset is returned, the penalty period is adjusted. The adjusted penalty period is based on the uncompensated value of the original transfer minus the value of the part of the asset that is returned. The part of the asset that is returned to the individual is considered available to the individual during the time period from the date of its transfer to the date of its return, and remains available for as long as the individual has the legal right, authority, or power to liquidate it.

RELEVANT DEPARTMENT PROCEDURES

UPM P-3029.17 provides procedures for evaluating intent to receive fair value or other valuable consideration.

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

Information Bulletin No.: 08-01 provides direction regarding the determination of compensation vs. other valuable consideration.

DISCUSSION

On August 27, 2007, the appellant netted \$227,634.68 from the sale of her property to a third party. The appellant then lived with her daughter in the community until the appellant was hospitalized on November 4, 2008.

On December 26, 2007, the appellant entered into a family care agreement with her daughter, agreeing to transfer the proceeds of the sale of her property to the daughter in exchange for services provided by the daughter to the appellant in the daughter's home.

The Department has taken the position that the appellant's daughter provided homemaker services to the appellant, preventing the appellant's institutionalization for an 11-month period. The agency has valued those services to have a value of \$9,464.00 per month, from the date the appellant and her daughter entered into their contract through the month in which the appellant became institutionalized.

The hearing officer found no error in the Department's determination that the appellant received \$104,104.00 in homemaker services from her daughter from December 26, 2007 through November 7, 2008. The daughter did not provide clear and convincing evidence that the services she provided to the appellant in that period of time had a fair market value in excess of \$104,104.00.

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.

The hearing officer also found no error in the Department's determination that the appellant received no compensation from her daughter or other equity in exchange for the \$8,075.00 that the appellant spent on replacing her daughter's kitchen cabinets. Although the appellant's daughter argued that the appellant had received the benefit of "nutritious meals," the hearing officer found that there was no reasonable dollar value that could be assigned to that benefit independent of those homemaker services for which the appellant was already compensating her daughter.¹

Therefore, the hearing officer must conclude that the appellant did not receive compensation for \$131,605.68 in transfers she made to her daughter prior to the appellant's November 19, 2008 application for Medicaid coverage for long-term care services. The appellant is subject to a penalty period of ineligibility for Medicaid payment for long-term care services of 13.90 months, starting March 1, 2009.

CONCLUSIONS OF LAW

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

1. the appellant transferred \$235,709.68 to her attorney-in-fact in 2007;
2. the appellant's attorney-in-fact rendered \$104,104.00 in homemaker services to the appellant from December 26, 2007 through November 4, 2008, preventing the appellant's institutionalization for those months;
3. the appellant was ineligible for Medicaid payment for long-term care services for a penalty period of 13.90 months, beginning on March 1, 2009.

DECISION

The Department is **UPHELD**.

Eva Tar
Hearing Officer

Pc: _____

Anne Collord, 40 Randal Avenue, West Hartford, CT 06110
George Chamberlin, Operations Manager, RO #52

¹ "The Grantee will assist with the purchase and delivery of groceries to the Grantor. If the Grantor is unable to prepare meals, the Grantee will prepare sufficient meals or arrange for the delivery of sufficient meals to ensure the health and welfare of the Grantor." (Dept. Ex. G)