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

[redacted] 2014
SIGNATURE CONFIRMATION

CL ID # [redacted]
Request # 539292

NOTICE OF DECISION

PARTY

[redacted]

PROCEDURALBACKGROUND

On [redacted] 2013, the Department of Social Services (the "Department") sent [redacted] (the "Appellant"), through her Attorney [redacted], a notice that she had transferred $752,048.00 to become eligible for Medicaid and the Department was imposing a penalty period of ineligibility for Medicaid payment of long term care services effective [redacted] 2012 through [redacted] 2018.

On [redacted] 2013, the Appellant requested an administrative hearing to contest the Department's penalty determination.

On [redacted] 2013, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") scheduled an administrative hearing for [redacted] 2013.

On [redacted] 2013, the Appellant's attorney requested a continuance, which OLCRAH granted.

On [redacted] 2013, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") scheduled an administrative hearing for [redacted] 2013.

On [redacted] 2013, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-189, inclusive, of the Connecticut General Statutes, the OLCRAH held an administrative hearing. The following individuals were present at the hearing:

[redacted], Appellant's daughter and POA
[redacted], Counsel for the Appellant
[redacted] Paralegal

[redacted], for the Appellant
Attorney Donald Cantor, for the Department
John Kramer, Blum Shapiro, for the Department
Constance Rokicki, Greer Benefit Consultants, for the Department
Attorney Daniel Butler, Counsel for the Department
Assistant Attorney General Jennifer Callahan, Counsel for the Department
Samantha Krusinski, Department's Representative
Laura Catarino, Department's Representative
Thomas Monahan, Hearing Officer

The hearing record remained open for the submission of additional evidence. On [redacted] 2014, the hearing record closed.

STATEMENTS OF THE ISSUES

The issues are whether the Department correctly imposed a Transfer of Asset ("TOA") penalty and whether the Department correctly denied the Appellant's claim for undue hardship in order to have the penalty waived?

FINDINGS OF FACT

1. On [redacted] 1966, the Appellant and [redacted] were married; the couple was married for over 45 years. (Appellant's Memorandum Part G: Divorce Transcript, [redacted]/11)

2. The Appellant and [redacted] have two adult daughters and one adult son. The son is 21 years old and receives Social Security benefits. (Hearing record)

3. The Appellant and [redacted] resided together at [redacted] until the Appellant could no longer live at home. (Ex. 1, Attachment 3: Quit Claim Deed, [redacted]/10)

4. In [redacted]2010, the Appellant began suffering from anxiety and vertigo and her behavior became unusual. The Appellant began screaming out for no reason. (Appellant's daughter's testimony)

5. On [redacted] 2010, the Appellant appointed her daughter, [redacted], as her Power of Attorney ("POA"). (Ex. K: Springing Durable Power of Attorney, [redacted]/10)

6. Throughout 2010 and 2011, the Appellant's condition continued to worsen. She needed help with her activities of daily living. Her ability to communicate and her mobility gradually diminished. (Appellant's daughter's testimony)

7. In 2010 and 2011, the Appellant was admitted to the Institute of Living, Natchaug Hospital and Hartford Hospital. The Appellant eventually was no longer able to

communicate or interact with anyone. (Appellant's daughter's testimony)

8. On [redacted], 2011, [redacted] initiated a divorce action against the Appellant. (Hearing record)

9. On [redacted], 2011, the court appointed the Appellant's other daughter, [redacted] as Guardian Ad Litem to represent the Appellant in the divorce action. (Appellant's Memorandum Part A and B: Motion and Stipulation for Appointment of Guardian Ad Litem, [redacted]/11)

10. On [redacted] 2011, fewer than three months after the initiation of the divorce, the Appellant was admitted to the Glastonbury Health Care Center (the "facility") with a diagnosis of major depressive disorder and dementia. (Ex. 1, Attach. 2: Connecticut Level 1 form)

11. The Appellant has been institutionalized continuously since [redacted] 2011 (the "date of institutionalization" or "DOI"). (Fact #10)

12. In [redacted] 2011, [redacted] resided in the community. (Hearing Record)

13. The Appellant's financial affidavit to the court related to the divorce, signed by the Guardian Ad Litem on [redacted] 2011, states that the Appellant had no income. The affidavit lists the Appellant's weekly expenses as zero. The affidavit lists the Appellant's assets as follows: Equity in the [redacted] residence of $100,000.00 [home valued at $275,000.00 with a $75,000.00 mortgage[1]], a 2006 Toyota with an equity value of $9,000.00, a Pacific Life account with a value of $1,000.00 and an IRA with a value of $55,000.00. The total cash value of the assets on the financial affidavit was $165,000.00. (Appellant's Memorandum Part C: Financial affidavit, [redacted]/11)

14. The Appellant's financial affidavit does not indicate that the Appellant receives Social Security income of approximately $500.00 per month and does not include as expensed the facility charge of approximately $3010.42 per week. (Appellant's Memorandum Part Q: Undue hardship request)

15. [redacted] financial affidavit to the court related to the divorce, signed by him on [redacted] 2011, states that he has net weekly income of $1,429.00. The affidavit lists his weekly expenses as $1,099.00. The affidavit lists his assets as follows: Equity in the [redacted] residence of $200,000.00 [home valued at $275,000.00 with a $75,000.00 mortgage], a 2010 Acura with an equity value of $5,000.00, savings and checking accounts with a total value of $20,000.00, a Pacific Life account with a value of $2,000.00, an ING annuity with a value of $98,096.00, Lincoln Financial Insurance with a cash value of $24,000.00, an IRA with a value of $70,000.00, and a mutual

[1] It should be noted that on [redacted] 2010, the Appellant quit claimed the [redacted] residence to [redacted]

fund valued at $2,000.00. [redacted] business is listed with a value of "undetermined". The total cash value of assets on the financial affidavit is $421,096.00. (Appellant's Memorandum Part E: Financial affidavit, [redacted]/11)

16. The Separation and Property Distribution Agreement (the "Separation Agreement") entered into by the Appellant and [redacted] provided the following terms: [redacted] is responsible for their son's college costs up to age 23, if he attends college; [redacted] retained the [redacted] home; the Appellant's son shall live with him and be financially supported by him until age 23; the Appellant waived her right to alimony; the Appellant's vehicle was transferred to [redacted] and he also retained his vehicle; the parties are responsible for their own medical costs; [redacted] retained his business, his life insurance policy, his IRA, Pacific Life account and his annuity; the Appellant retained her IRA. The Appellant retained $55,000.00 under the Settlement Agreement. (Appellant's Memorandum Part F: Separation and Property Distribution Agreement, [redacted]/11).

17. The Separation Agreement does not include any information related to the fact that the Appellant was residing in a nursing facility and does not include any information relating to her dementia diagnosis or other health conditions. (Ex. 6 : Divorce Court Transcript, [redacted]/14)

18. Neither the Appellant's POA nor the he Appellant's Guardian Ad Litem was present at the divorce proceedings on [redacted] 2011. The Appellant's divorce attorney, [redacted] did not ask [redacted] any questions during the divorce proceedings. (Ex. 6 : Divorce Court Transcript, [redacted]/14)

19. At the divorce proceedings, neither the Appellant's representatives nor [redacted] told the court that the Appellant was residing in a nursing facility and that she had a diagnosis of dementia. (Ex. 6 : Divorce Court Transcript, [redacted]/14)

20. In [redacted] 2011, the court approved the Separation Agreement and ordered that the Separation Agreement be incorporated by reference into the divorce decree. The Settlement Agreement stated that the "parties participated in the collaborative approach to negotiate and settle all matters concerning their dissolution of marriage." (Exhibit 6: Dissolution of Marriage Judgment; Appellant's Memorandum Part F: Separation and Property Distribution Agreement, [redacted]/11)

21. Prior to the court approving the Settlement Agreement, the judge did not ask, nor was evidence presented by either party, about the following issues: the causes for the dissolution of the marriage; the parties' living situations; the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of the parties; and the opportunity of the parties for future acquisition of capital assets and income. (Ex. 6 : Divorce Court Transcript, [redacted]/14)

22. The Appellant's witness, [redacted], has practiced family law exclusively

since 1994. Her focus is on non-adversarial divorce, which includes mediation and collaborative divorce. She is a member of the International academy of Collaborative Professionals. (Attorney [redacted] testimony)

23. A collaborative divorce is a non-adversarial divorce. A collaborative divorce is a client centered conflict resolution. It focuses on creating a resolution that takes into account the highest objective of a divorcing couple and their children. A collaborative divorce focuses on the needs of each spouse and their children if that's important to them. A collaborative divorce looks at collaborative factors and statutory requirements. (Attorney [redacted] testimony)

24. Attorney [redacted] has no direct knowledge of the circumstances or objectives relating to the Appellant and [redacted] divorce. (Attorney [redacted] testimony)

25. On [redacted] 2011, the Department received an application for Long Term Care Medicaid for the Appellant. The Application was signed by the POA. She wanted the long-term care assistance to be effective starting [redacted] 2011. (Ex. 1 Attach. 1: Application form, [redacted]/11)

26. Based on the financial affidavits, if the Appellant had applied for Medicaid prior to the divorce, the total of the couple's countable asset for determining Medicaid eligibility, was $277,096.00, excluding the value of the residence and the higher valued vehicle ($421,096.00, minus $200,000.00 residence, minus $9,000.00 vehicle). (Appellant's Memorandum Part C: Financial affidavit, [redacted]/11; Appellant's Memorandum Part E: Financial affidavit, [redacted]/11)

27. On [redacted] 2013, the Department issued a Transfer of Assets Preliminary Decision Notice stating that the Appellant transferred $316,901.00 in order to be eligible for assistance and proposing a penalty of 71 months. The Department determined that the Appellant transferred these assets for less than fair market value through the Separation Agreement. The amount was calculated as follows: $177,500.00 [1/2 of house valued at $355,000.00] + $139,401.04 value of alimony. (Ex. 1, Attach. 20: Preliminary Transfer Notice, [redacted]/13)

28. On [redacted] 2013, the Department received a rebuttal to the proposed transfer of asset penalty from an attorney at [redacted] a firm specializing in estate planning, on behalf of the Appellant. The rebuttal challenged the Department's conclusion that the transfer of the home was done for purposes of Medicaid eligibility assets. The rebuttal further also asserted that it was improper for the Department to consider a "non-existent alimony payment stream" as a transfer of assets for purposes of establishing eligibility for Medicaid long-term care services. (Ex. 1, Attach. 21: Rebuttal, [redacted]13)

29. On [redacted] 2013, the Department received a report from attorney Donald Cantor (the "Department's Consultant"), a family law attorney, whom the Department hired to review the circumstances of the divorce between the Appellant and [redacted]

(Ex. 6: Department Consultant's Report and Exhibits)

30. The Department's Consultant determined that the value of [redacted] business was $212,000.00. (Ex. 6, Attach. 14: Department Consultant's Report, business valuation, Ex. 10: Amended business valuation)

31. The Department determined that the fair market value of the [redacted] residence, as of [redacted] 2011, was $355,000.00, based on three comparable sales from [redacted] 2011 to [redacted] 2012. (Ex. 6, Attach. 14: Department Consultant's Report, Department's fair market value determination)

32. Constance Rokicki, a member of the Academy of Actuaries who assisted the Department's Consultant, determined the present value of the alimony that would have been part of a fair and equitable separation agreement. Using mortality tables and based on [redacted] income, she determined that he would have paid a present-value for alimony based on three values: $40,000 per year, $45,000 per year and $50,000 per year. (Ex. 6, Attach. 18: Department Consultant's Report, Actuarial Valuation)

33. The Department determined that alimony valued at $414,500.00 should have been paid to the Appellant as part of a fair and equitable separation agreement. The $414,500 actuarial value is slightly less than the present-value calculation of alimony at $45,000 per year. (Ex. 6, Attach. 18: Department Consultant's Report, Actuarial Valuation)

34. The Appellant did not dispute the Department's determination of the alimony value. (Hearing Record)

35. Had the Appellant fully pursued getting alimony during the divorce proceeding, she would have received a lifetime alimony award between $40,000 and $50,000 per year or an actuarial value of $414,500.00 per year. (Ex. 6, Attach 18: Department's consultant's Report, Actuarial Valuation)

36. On [redacted] 2013, the Department issued a Transfer of Assets Preliminary Decision Notice with an updated transfer penalty amount of $752,048.00. The transfer amount was broken down as follows: **$110,500.00** [1/2 value of [redacted] business] + **$40,000.00** [1/2 of property value, the amount in excess of $275,000.00 = $355,000.00, Department value, minus [redacted] financial affidavit value, $275,000.00 = $80,000.00] + **$187,048.00** [Total financial affidavit Values = $486,096.00/ 2= $243,048.00 for each spouse, minus the amount the Appellant actually received in the divorce of $56,000.00 = $187,048.00], which is the amount the Appellant did not receive in the divorce + **$414,500.00** [actuarial value of alimony]. (Ex. 1, Attach. 22: Preliminary Decision Notice [redacted]/13, Ex. 6: Consultant's Report and Exhibits)

37. The Department did not receive a rebuttal to the revised Transfer of Assets Preliminary

Decision Notice. (Hearing record)

38. On [redacted], 2013, the Department issued a Transfer of Assets Final Decision Notice and a Notice of Response to rebuttal/Hardship claim to the Appellant, notifying her that, because she had transferred $752,048 in [redacted] 2011 to become eligible for Medicaid. The Department was imposing a Long Term Care Services penalty from [redacted] 2012 through. [redacted] 2018. (Ex. 1, Attach. 23, 24: Transfer notices)

39. On [redacted] 2013, the Department received the Appellant's request for a finding of undue hardship. The request stated that the facility had notified the Appellant that it intended to discharge her due to nonpayment, and that the other facilities that were contacted refused to admit the Appellant due her transfer of asset penalty. (Appellant's Memorandum Part Q: Facility affidavits, Exhibit 1, Attach. 25: Undue hardship request, [redacted]/13)

40. On [redacted] 2013, the Department denied the Appellant's request for undue hardship because she had deliberately impoverished herself in order to qualify for medical assistance. (Exhibit 1, Attach. 26: Undue hardship denial, [redacted]/[redacted]/13)

CONCLUSIONS OF LAW

1. The Department is the state agency in Connecticut that administers the Medicaid program pursuant to Title XIX of the Social Security Act. The Department may make such regulations as are necessary to administer the medical assistance program. Conn. Gen. Stat. § 17b-2; Conn. Gen. Stat. § 17b-262.

2. The Department is the sole agency to determine eligibility for assistance and services under the programs it operates and administers. Conn. Gen. Stat. § 17b-261b(a).

3. The Department shall grant aid only if the applicant is eligible for that aid. Conn. Gen. Stat. § 17b-80(a).

4. Federal law defines an asset, for purposes of the Medicaid program, as "all income and resources of the individual and of the individual's spouse including any income or resources which the individual or such individual's spouse **is entitled to but does not receive because of action**-(A), by the individual or individual's spouse, (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or **(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse"**. 42 USC §1396p(h)(1). (emphasis added)

5. State regulation provides that 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 available to the unit, or deemed available to the unit. Uniform Policy Manual ("UPM") § 4005.05 (A).

6. State statute and regulation provide that, for purposes of establishing eligibility for Medicaid, the Department considers an asset available when it is 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. Conn. Gen. Stat. § 17b-261(c); UPM § 4005.05 (B)(2).

7. State regulation provides that an assistance unit is not eligible for benefits under Medicaid, if the unit's equity in counted assets exceeds the asset limit for the particular program. UPM § 4005.05 (D)

8. State regulation provides that the asset limit for a needs group of one in the Medical Assistance for Aged, Blind or Disabled ("MAABD") program is $1,600.00. UPM § 4005.10.

9. An individual who entered an institution on or after September 30, 1989, and has a spouse who lives in the community, is also able to have a portion of the couple's combined assets protected for the use of the community spouse. 42 USC §1396r-5.

10. The value of the protected assets is not counted when the eligibility of the institutionalized individual is determined. The amount that can be protected is determined by adding together the counted assets of both spouses as of the date the institutionalized individual entered the facility and dividing the amount in half to establish a spousal share. 42 USC §1396r-5.

11. UPM § 4022.05(B)(2) provides that every January 1, the Community Spouse Protected Amount ("CSPA") shall be equal to the greatest of the following amounts:

    a. the minimum [Community Spouse Protected Amount] CSPA; or
    b. the lesser amount of:
        (1) the spousal share calculated in the assessment of spousal assets (Cross Reference 1507.05); or
        (2) the maximum CSPA; or
    c. the amount established through a Fair Hearing decision (Cross Reference 1507); or
    d. the amount established pursuant to a court order for the purpose of providing necessary spousal support.

12. If the Appellant and [redacted] had been married at the time the Appellant applied for Medicaid, [redacted] would have been entitled to the maximum Community Spouse Protected Amount ("CSPA") of $109,560.00.

13. When an institutionalized individual and his or her spouse have assets which exceed the amount established as the CSPA and the $1,600.00 asset limit for the institutionalized individual, the excess assets are considered to be available to the

institutionalized individual. This is true regardless of which spouse is the owner of the assets. UPM § 4005.10, 42 USC §1396r-5.

14. UPM § 4005.15(A)(2) provides that in the Medicaid program at the time of application, the assistance unit is ineligible until the first day of the month in which it reduces its equity in counted assets to within the asset limit.

15. The institutionalized individual is not eligible for Medicaid until the couple's combined assets are reduced to the total of the $1,600.00 asset limit and the CSPA.

16. Based on a CSPA of $109,560.00, which [redacted] could have retained, and $1,600.00, which the Appellant was permitted to retain, the Appellant would have had to reduce its assets by the amount of $165,936.00 before being eligible for Medicaid ($277,096.00 - $111,160.00).

17. The Department uses the policy contained in Chapter 3029 of the UPM to evaluate transfers of assets. UPM § 3029.03.

18. State regulation defines a “transfer of an asset” as 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. UPM § 3001.01.

19. There is a period established, subject to the conditions described in chapter, 3029 of the UPM, 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(A).

20. The look-back date for transfers of assets is a date that is sixty 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. UPM § 3029.05(C).

21. The Department considers transfers of assets made within the time limits as described in 3029.05 C or at any other time, on behalf of an institutionalized individual or his or 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. Conn. Gen. Stat. 17b-261(a); UPM § 3029.05(D).

22. 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(a).

23. 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(E).

24. An institutionalized individual, or his 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(F).

25. State statute provides, in part, that a disposition of property ordered by a court shall be evaluated in accordance with the standards applied to any other such disposition for the purpose of determining eligibility for Medicaid. Conn. Gen. Stat. § 17b-261(a).

26. At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect. Conn. Gen. Stat. 46b-81(a).

27. In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. Conn. Gen. Stat. § 46b-81(c).

28. The Appellant did not present evidence to the court concerning her interests in the couple's property during the divorce proceeding, and she was awarded a disproportionately small percentage of the total value of the couple's property, even though she and [redacted] had been married for over 45 years; she was in poor health and was residing in a nursing facility incurring significant expenses; and she has no income.

29. At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is

unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment. Conn. Gen. Stat. 46b-82(a).

30. If the court, following a trial or hearing on the merits, enters an order pursuant to subsection (a) of this section, or section 46b-86, and such order by its terms will terminate only upon the death of either party or the remarriage of the alimony recipient, the court shall articulate with specificity the basis for such order. Conn. Gen. Stat. 46b-82(b).

30. Any post judgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony. Conn. Gen. Stat. § 46b-82(c).

31. The Appellant did not present evidence to the court concerning her interest in receiving alimony during the divorce proceeding, and she was not awarded any alimony from [redacted] even though she and [redacted] had been married for over 45 years; she has social security income; she was in poor health and she was residing in a nursing facility and incurring significant expenses.

32. Had the Appellant fully pursued getting alimony during the divorce proceeding, she would have received a lifetime alimony award between $40,000 and $50,000 per year or an actuarial value of $414,500.00 per year.

33. An institutionalized individual, or his spouse, may transfer as 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(F).

34. The Appellant failed to establish with clear and convincing evidence that she received fair market for the marital assets and alimony she waived as part of the Settlement Agreement.

35. The Department considers a transferor to have met his or her foreseeable needs if, at the time of the transfer, he or she retained other income and assets to cover basic living expenses and medical costs as they could have reasonably been expected to exist based on the transferor’s health and financial situation at the time of the transfer. UPM § 3029.15(B).

36. The Appellant did not meet her foreseeable needs because she did not retain

income and assets to cover her basic living expenses and medical costs as they could have reasonably been expected to exist, given her residence at a nursing facility, her impaired health and her financial situation at the time of the Settlement Agreement.

37. An applicant's failure "to avail himself of assets he could have obtained through his divorce" by transferring assets to the ex-spouse is properly considered a transfer of assets for less than fair market value, subject to a penalty period. ". *See Husband v. Department of Social Services*, Circuit Court of South Dakota, Second Judicial Circuit, Lincoln & Minnehaha Counties (August 20, 2012) (Divorce and settlement agreement leaving Husband with $11,000.00 and Wife with $300,000.00 ruled to be a transfer of assets for the purpose of establishing eligibility for Medicaid when it was done after 23 years of marriage with Husband in a nursing facility with chronic renal disease.)

38. The Appellant, like the Husband in *Husband v. Department of Social Services*, through the Settlement Agreement, transferred assets to [redacted] for less than fair market value and for the purpose of qualifying for Medicaid.

39. Although a Superior Court Judge may have found the Settlement Agreement was fair, just and equitable, the Superior Court does not decide eligibility for Medicaid. The Department is the sole agency to determine eligibility for assistance and services under the programs it operates and administers. Conn. Gen. Stat. § 17b-261b(a).

40. The Appellant failed to rebut, by clear and convincing evidence, the presumption that her waiver of income and property through the collaborative divorce process and Settlement Agreement was made with the intent of obtaining eligibility for long-term care Medicaid.

41. The Appellant did not establish with clear and convincing evidence that she transferred $743,048 to [redacted] via the Settlement Agreement, for a purpose other than qualifying for assistance; she did not demonstrate intent to receive fair market value, nor did she show that her foreseeable needs were met, or that the transferred asset would not affect eligibility if retained. UPM § 3029.10, 3029.15

42. The Department correctly imposed a transfer of asset penalty against the Appellant; the correct amount of the transfer is $743,048.00 instead of $752,048.00, due to the adjustment of the business valuation.

43. State regulation provides 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 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. UPM § 3029.05(E)

44. UPM 3029.05 F. provides as follows:

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.
b. For recipients, the average monthly cost for LTCF services is based on the figure as of: (1) the month of institutionalization; or
(2) the month of the transfer, if the transfer involves the home, or the proceeds from a home equity loan, reverse mortgage or similar instrument improperly transferred by the spouse while the institutionalized individual is receiving Medicaid, or if a transfer is made by an institutionalized individual while receiving Medicaid (Cross Reference: 3029.15).

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.

4. Once the Department imposes a penalty period, the penalty runs without interruption, regardless of any changes to the individual's institutional status.

45. The Department's imposition of a 71-month penalty period of ineligibility for Medicaid payment of long term care services is incorrect.

46. The correct length of the penalty period of ineligibility for Medicaid payment of long-term care services is 70.19 months, using the corrected transfer amount of $743,048.00 ($743,048.00 / average monthly cost of care of $10,366.00).

47. Federal law provides that in the case of a transfer of an asset made on or after February 8, 2006, the date specified in this subparagraph [the start date of the penalty period] is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period,

whichever is later, and which does not occur during any other period of ineligibility under this subsection. 42 USC § 1396p(c)(1)(D)(ii).

48. The penalty period begins as of 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. UPM § 3029.05.E.2.

49. The Department's determination of [redacted] 2012 as the start date of the period of ineligibility for Medicaid payment for long term care services is correct.

50. The Department's determination of [redacted] 2018 as the end date of for the period of ineligibility for Medicaid payment of long term care services is not correct. UPM § 3029.05(E)

51. The correct Medicaid penalty period end date is [redacted] 2018.

52. State statute provides that, except as provided in subsection (c) of section 17b-261o of the Connecticut General Statutes, the Commissioner of Social Services shall not impose a penalty period pursuant to subsection (a) of section 17b-261 or subsection (a) of section 17b-261a if such imposition would create an undue hardship. Conn. Gen. Stat. 17b-261o(a).

53. For purposes of section 17b-261o of the Connecticut General Statutes, "undue hardship" exists when (1) the life or health of the applicant would be endangered by the deprivation of medical care, or the applicant would be deprived of food, clothing, shelter or other necessities of life, (2) the applicant is otherwise eligible for medical assistance under section 17b-261 but for the imposition of the penalty period, (3) if the applicant is receiving long-term care services at the time of the imposition of a penalty period, the provider of long-term care services has notified the applicant that such provider intends to discharge or discontinue providing long-term care services to the applicant due to nonpayment, (4) if the applicant is not receiving long-term care services at the time of the imposition of a penalty period, a provider of long-term care services has refused to provide long-term care services to the applicant due to the imposition of a penalty period, and (5) no other person or organization is willing and able to provide long-term care services to the applicant.

54. The commissioner shall impose a penalty period pursuant to subsection (a) of section 17b-261 or subsection (a) of section 17b-261a if the applicant made a transfer or assignment of assets to deliberately impoverish such applicant in order to obtain or maintain eligibility for medical assistance. Conn. Gen. Stat. 17b-261o(c)(1).

55. By entering into the Settlement Agreement and waiving her rights to property and alimony, The Appellant deliberately impoverished herself to become eligible for medical assistance.

56. Because the Appellant deliberately impoverished herself in order to become eligible for medical assistance, the Department correctly declined the Appellant's request for undue hardship.

DISCUSSION

Based on the testimony and evidence presented, I conclude that the Department was correct in applying a transfer of asset penalty. The amount of the penalty is adjusted from $752,048 to $743,048, due to the corrected valuation of the spouse's business. The Appellant failed to provide clear and convincing evidence that the transfers were made for a purpose other than qualifying for long term care medical assistance. The evidence clearly indicates that the Appellant and her spouse entered into a separation agreement in order for her to qualify for long term care medical assistance.

The Appellant's attorney argued that the Appellant divorced [redacted] for reasons other than to qualify for Medicaid. He argued that the Appellant and her spouse entered in to a collaborative divorce and they were each represented by independent counsel. He also argued that the separation agreement was approved by the court as fair and just. The Appellant's witness, [redacted], who handles collaborative divorce matters, stated that based on the evidence and testimony, the divorce in this case was consistent with the collaborative divorce process. The Appellant's attorney further argued that the Department's witness, who reviewed the separation agreement, was not an expert in collaborative divorce, and was not involved in the divorce proceeding.

A collaborative divorce in and of itself is not evidence that the Appellant's divorce was done for reasons other than to qualify for assistance. The Appellant did not present evidence to rebut the Department's findings, other than stating repeatedly that the divorce was collaborative. The testimony of the Appellant's witness that the divorce was consistent with the collaborative divorce process is not clear and convincing evidence that the transfers were made for a reason other than to qualify for assistance. The Appellant's collaborative divorce expert testified that a collaborative divorce is a client centered resolution that takes into account the highest objective of the divorcing couple and their children. Based on that principal, the objective of this divorce was to take care of [redacted] and his children and to impoverish [redacted]. No testimony or evidence presented at the hearing accounted for the needs of the Appellant in the convalescent home. The $56,000.00 the Appellant received as a result of the Separation Agreement was not enough to meet her foreseeable needs in the convalescent home for more than a matter of months.

In this case, nothing presented by the Appellant's attorney met the burden of providing clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance. The bottom line is that [redacted] retained

almost all the marital assets without regard to the Appellant's needs and their marriage of 45 years.

The testimony and evidence clearly indicates that the Appellant impoverished herself and, thus, does not meet the requirements of undue hardship.

DECISION

The Appellant's appeal is DENIED.

Thomas Monahan
Thomas Monahan
Hearing Officer

Pc: Albert Williams, Operations Manager, Hartford Regional Office
Musa Mohamud, Operations Manager, Hartford Regional Office
[redacted]

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.