STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
55 FARMINGTON AVENUE
HARTFORD, CT 06105-3725

[redacted] **2015**
Signature Confirmation

Client ID # [redacted]
Request # 701565

NOTICE OF DECISION

PARTY

[redacted]
C/O
[redacted]

PROCEDURAL BACKGROUND

On [redacted] 2015, the Department of Social Services (the "Department") sent [redacted] (the "Appellant") a Notice of Action ("NOA") regarding the amount of applied income that he must pay toward his cost of long-term care ("LTC").

On [redacted] 2015, the Appellant's conservator requested an administrative hearing to contest the Department's calculation of the applied income amount.

On [redacted] 2015, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling an administrative hearing for [redacted] 2015

On [redacted] 2015, in accordance with sections 17b-60, 17-61 and 4-176e to 4-189 inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing.

The following individuals were present at the hearing:

[redacted], Appellant's Conservator
Lenora Riley, Department's Representative
Thomas Monahan, Hearing Officer

STATEMENT OF THE ISSUE

The issue is whether the Department has correctly calculated the amount of applied income that the Appellant is responsible to pay to the facility for the cost of his care.

FINDINGS OF FACT

1. On [redacted] 2015, the Appellant was admitted to Mattatuck Health Care of [redacted]. (Exhibit B: LTC application, [redacted]/15)

2. On [redacted] 2015, the Department received an application from the Appellant for LTC medical assistance. (Ex. B: LTC application, [redacted]/15)

3. On [redacted] 2015, the Department granted the Appellant Husky D Low Income Adults- facility assistance effective February 2015. (Ex. C: Notice of Approval, [redacted]/15)

4. The Appellant receives $2,357.98 monthly disability pension from the [redacted] (Appellant's brief, p. 11, Ex. B: LTC application, [redacted]/15)

5. The Appellant is expected to return to the community at the end of [redacted] of 2015. (Hearing record)

6. The Appellant's monthly rent is $975.00. (Ex. G: Lease Agreement, [redacted]/14)

7. For purposes of calculating the portion of the Appellant's income that he is required to pay toward to cost of his care at the facility (applied income), the Department deducts $650.00 from his gross monthly income as a home maintenance expense. (Hearing record, Exhibit I: Medical financial screens)

8. For purposes of calculating the portion of the Appellant's income that he is required to pay toward to cost of his care at the facility (applied income), the Department deducts $60.00 from his gross monthly income as his Personal Needs Allowance ("PNA"). (Ex. I: Medical financial screens)

9. The Department calculated the Appellant's Applied Income to be $1,647.98 effective [redacted] 2015 ($2,357.98 Disability pension - $650.00 Home maintenance - $60.00 PNA) (Ex. I: Medical financial screens)

10. Because the Appellant is responsible for paying $1,647.98 in applied income to the facility, the Department's Medicaid payment to the facility on behalf of the Appellant is the difference between the facility's monthly Medicaid rate and the amount of the Appellant's applied income.

11. On [redacted] 2009, the Appellant was divorced. Article 5.1 of the divorce decree provides that the Appellant will pay $146.00 per week to his wife in child support for their one minor child. Articles 5.2 and 5.3 of provide that the husband and wife will share equally child care and extracurricular and school related activities. (Ex. F: Divorce Decree)

12. Article 7.1 of the Divorce Decree provides that neither party is entitled to alimony which is forever banned. (Ex. F: Divorce Decree)

13. Article 10.2 of the Divorce Decree provides that the Appellant must immediately transfer to the wife $410.00 from his gross disability pension to his wife via a Qualified Domestic Relations Order ("QDRO") (Ex. F: Divorce Decree)

14. The Appellant did not verify private medical insurance coverage wherein he incurs a monthly insurance premium. (Department's Testimony)

15. The Appellant's conservator requests a deduction for child support, shared child expenses and the Qualified Domestic Relations Order. (Hearing record, Appellant's Ex. A: Hearing Summary)

CONCLUSIONS OF LAW

1. Section 17b-2 of the Connecticut General Statutes ("CGS") authorizes the Commissioner of the Department of Social Services to administer the Medicaid program.

2. Section 17b-261(n) of the Connecticut General Statutes authorizes coverage for low – income adults under the Medicaid program. The state Medicaid plan is amended to establish an alternative benefit package. The Commissioner of Social Services shall, subject to federal approval, administer coverage under the Medicaid program for low income adults in accordance with Section 1902 (a)(10)(A)(i)(VIII) of the Social Security Act.

   Sections 17b-260 to 17b-264 of the Connecticut General Statutes authorizes the Commissioner of Social Services to administer Title XIX Medical Assistance program to provide medical assistance to eligible persons in Connecticut.

3. Title 42 United States Code § 1396a (a) (17) provides in part that State Medicaid programs must set reasonable standards for assessing an individual's income and resources. These standards provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary (of Health and Human Services), available to the applicant or recipient.

4. Available income is all income from which the assistance unit is considered to benefit, either through actual receipt or by having the income deemed to exist for its benefit. Uniform Policy Manual ("UPM"), section 5000.01.

5. State regulation provides that, except to the extent that it is specifically excluded, the Department counts all of the individual's income when determining the income that is available to the individual. UPM § 5005(A, B)

6. Court-ordered alimony and support payments are not deducted from an assistance unit's gross income and are considered as available income. *Himes v. Shalala*, 999 F. 2d 684, 688 (2nd Cir.1993); *Clark v. Comm'r of Income Maintenance*, 209 Conn. 390, 403 (1988)

7. The $410.00 of the Appellant's [redacted] Disability pension that is assigned to the Appellant's ex-spouse as a result of the QDRO is not available to the Appellant.

8. The Department does not count income that it considers to be inaccessible to the assistance unit. UPM 5005(B)

9. Counted income is that income which remains after excluded income is subtracted from the total amount of available income. UPM § 5000.01.

10. The Appellant's remaining disability pension that remains after the QDRO payment to the Appellant's ex-spouse is available income.

11. Neither State of Federal law provides for the exclusion of child support payments from available income. See 42 C.F.R. 435.831

12. In a divorce, courts are required to make an equitable distribution of the parties' property. The primary aim of property distribution is "to recognize that marriage is, among other things, 'a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute -- directly and indirectly, financially and nonfinancially--*the fruits of which are distributable at divorce*.'" Krafick v. Krafick, 234 Conn. 783, 795-96(1995) (emphasis in original) (internal citation omitted).

13. In Connecticut, pension benefits are classified as property, and "are widely recognized as among the most valuable assets that parties have when a marriage ends." Id. at 796. They are "an economic resource acquired with the fruit of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other deferred income assets." Id.

14. Pensions are subject to equitable distribution in divorce settlements.

15. The assignment of an interest in a party's pension or retirement plan is in the nature of a property distribution. Bartolotta v. Bartolotta, 2009 Conn. Super. LEXIS 1861 (2009).

16. The purpose of equitable distribution differs from that of support obligations. The purpose of equitable distribution is to achieve a fair distribution of what the parties acquired during their marriage.

17. A property award is "of different quality and consequence" from alimony. "An award of property is final; the party who receives property [as part of a property settlement in a divorce] owns it in his or her own right and controls it. Periodic alimony, on the other hand, is conditional, subject to modification or elimination." Krafick, 234 Conn. at 798 n.22.

18. The Appellant does not own the monthly $410.00 QDRO deducted from his pension

19. The Department incorrectly counted the $410.00 QDRO as available income.

20. State regulation provides that assistance units who are residents of long-term care facilities are responsible for contributing a portion of their income toward the cost of their care. UPM § 5045.20.

21. The difference between the assistance unit's contribution and the long-term care facility's Medicaid rate is the amount the Department pays to the long-term care facility on behalf of the assistance unit.

22. The portion of one's income that the assistance unit is required to pay toward the cost of his or her care is called applied income.

23. Applied income is that portion of the assistance unit's countable income that remains after all deductions and disregards are subtracted. UPM §§ 5000.01, 5045.20(B)(1)(b)

24. State regulation provides that the Department computes applied income by subtracting certain disregards and deductions, as described in this section, from counted income. The Department uses the assistance unit's applied income to determine income eligibility and to calculate the amount of benefits. UPM § 5005 (C ,D).

25. Deductions are those amounts that are subtracted as adjustments to counted income and represent expenses paid by the assistance unit. UPM § 5000.01

26. Regulation provides that the amount of income to be contributed is calculated using the post-eligibility method starting with the month in which the 30th day of continuous LTCF care or receipt of community-based services occurs, and

ending with the month in which the assistance unit member is discharged from the LTCF or community-based services are last received. UPM § 5045.20(A)

27. Regulation provides that the amount of income to be contributed is calculated using the post-eligibility method starting with the month in which the 30th day of continuous LTCF care or receipt of community-based services occurs, and ending with the month in which the assistance unit member is discharged from the LTCF or community-based services are last received. UPM § 5045.20(A)

28. Federal law requires the Department to deduct certain amounts from an assistance unit's income, in a specific order, when calculating the amount it will pay to a long-term care facility on behalf of an the assistance unit. 42 C.F.R. 435.82 (c).

29. Neither child support nor alimony payments are permissible deductions under state or federal law.

30. A PNA of $60.00 must be deducted from the gross income of residents of long-term care facilities when calculating the amount of the applied income. Conn. Gen. Stat. 17b-272; 42 C.F.R. 435.832 (c)(1); UPM 5035.20 B. 2.

31. Title 42 of the Code of Federal Regulation ("CFR") § 435.81 addresses deductions from income for medically needy and institutionalized individuals and provides in part that in determining countable income the agency must deduct the following amounts:

    1. For individuals under age 21 and caretaker relatives, the agency must deduct amounts that would be deducted in determining eligibility under the State's AFDC plan.

    2. For aged, blind, or disabled individuals in States covering all SSI beneficiaries, the agency must deduct amounts that would be deducted in determining eligibility under SSI. However, the agency must also deduct the highest amounts from income that would be deducted in determining eligibility for optional State supplements if these supplements are paid to all individuals who are receiving SSI or would be eligible for SSI except for their income.

    3. For aged, blind, or disabled individuals in States using income requirements more restrictive than SSI, the agency must deduct amounts that are no more restrictive than those used under the Medicaid plan on January 1, 1972 and no more liberal than those used in determining eligibility under SSI or an optional State supplement. However, the amounts must be at least the same as those that would be deducted

in determining eligibility, under §435.121, of the categorically needy.

32. 42 CFR § 435.82 provides for required deductions from the assistance units income.

UPM § 5035.20 (B) provides that the following monthly deductions are allowed from the income of assistance units in LTCF's:

(1) for veterans whose VA pension has been reduced to $90.00 pursuant to P.L. 101-508, for spouses of deceased veterans whose pension has been similarly reduced pursuant to P.L. 101-508, as amended by Section 601 (d) of P.L. 102-568, a personal needs allowance equal to the amount of their VA pension and the personal needs allowance described in 2. below;

(2) a personal needs allowance of $50.00 for all other assistance units, which, effective July 1, 1999 and annually thereafter, shall be increased to reflect the annual cost of living adjustment used by the Social Security Administration[current personal needs allowance is 60.00];

(3) an amount of income diverted to meet the needs of a family member who is in a community home to the extent of increasing his or her income to the MNIL which corresponds to the size of the family;

(4) Medicare and other health insurance premiums, deductibles, and coinsurance costs when not paid for by Medicaid or any other third party;

(5) costs for medical treatment approved by a physician which are incurred subsequent to the effective date of eligibility and which are not covered by Medicaid;

(6) expenses for services provided by a licensed medical provider in the six month period immediately preceding the first month of eligibility providing the following conditions are met:

a. the expenses were not for LTCF services, services provided by a medical institution equivalent to those provided in a long term care facility, or home and community-based services, when any of these services were incurred during a penalty period resulting from an improper transfer of assets; and

b. the recipient is currently liable for the expenses; and

c. the services are not covered by Medicaid in a prior period of eligibility.

(7) the cost of maintaining a home in the community for the assistance unit, subject to the following conditions:

a. the amount is not deducted for more than six months; and

b. the likelihood of the institutionalized individual's returning to the community within six months is certified by a physician; and

c. the amount deducted is the lower of either:

(1) the amount the unit member was obligated to pay each month in his or her former community arrangement; or

(2) $650 per month if the arrangement was Level 1 Housing; or

(3) $400 per month if the arrangement was Level 2 Housing; and

d. the amount deducted includes the following:

(1) heat (2) hot water (3) electricity (4) cooking fuel

(5) water (6) laundry (7) property taxes (8) mortgage interest

(9) fire insurance premiums (10) amortization

33. The Department correctly determined the Appellant entered Mattatuck Healthcare [redacted] 2015 and the 30th day of continuous care takes place in [redacted] 2015.

34. UPM § 5045.20 (B) (1) (b) provides that total gross income is reduced by post-eligibility deductions (Cross reference: 5035-"Income Deductions") to arrive at the amount of income to be contributed.

35. UPM § 5045.20 (D) provides that the difference between the assistance unit's contribution and the Medicaid rate of the LTCF or CBS is the amount of benefits paid by the Department to the facility or provider organization on the unit's behalf.

36. The Department correctly allowed for the deduction of the $60.00 PNA from the Appellant's gross income.

37. The Department correctly allowed for the maximum deduction of $650.00 from the Appellant's gross income for maintaining a home in the community.

38. The Department correctly did not allow for the deduction of the Appellant's monthly child support obligation.

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39. The Department correctly did not allow for additional child support expenses for his minor child.

40. The Appellant's applied income effective [redacted] 2015, is $1,237.98 $(2,357.98 pension - $410.00 QDRO - $60.00 PNA - $650.00 maintenance allowance)

DISCUSSION

The regulation requires that residents of LTCF are responsible for contributing a portion of their income toward the cost of their medical care. In the Appellant's situation, the record established that he is a resident of a LTCF, and therefore, he must contribute a portion of his income towards the cost of his medical care.

I find that court ordered payments which include child support and related expenses are not allowable deductions from the Appellant's gross monthly income and are considered available. In Himes V. Shalala as noted above, the U.S. Court of Appeals stated that these types of court payments are available income. In that case the Plaintiffs claimed that the dictionary definition of available is an adjective meaning: suitable or ready for use or service; at hand readily obtainable; accessible." The Plaintiffs claimed that the dictionary definition of available should be dispositive and cited Consumer Product Safety Commission v. GTE Sylvania, Inc. 447 U.S. 102, 100 S. Ct. 2051, 64 L.ED.2d 766 (1980). The court disagreed that the dictionary definition should be applied because "Congress has expressly delegated authority to the Secretary to define the meaning of available". 42 USC § 1396a(a)(17) clearly states that available income is determined in accordance with standards prescribed by the Secretary.

Himes v. Shalala also cited the United States Court of Appeals ruling on the available income issue. In Peura v. Mala, 977 F.2d 484 (9thCir. 1992) the court affirmed that court ordered support is available income.

In a Connecticut Supreme Court case, Louise Cark, Conservatrix (Estate of Wilbur Clark) v. Commissioner of Income Maintenance 209 Conn.390, decided in 1988 that for Medicaid Eligibility purposes, a probate court order for the institutionalized incompetent to pay his at home spouse was available income for the institutionalized incompetent's calculation of applied income. The Court found that the State of Connecticut must consider the Probate Court order in determining an applicant's eligibility for the federally funded Medicaid program In this case at the time of application the community spouse did not pursue or provide asset information regarding her assets for a community spouse protected amount to meet her needs. The Court ruled that federal regulations do not include a deduction for court orders.

I find that a QDRO which assigns a portion of an individual's pension to an ex-spouse is different from court ordered child support or alimony. As opposed to alimony or court ordered child support, as a result of the QDRO, the person against whom a QDRO is issued no longer owns that income. Because the Appellant no longer owns $410.00 of

his disability pension, that amount cannot be considered as income that is available to him.

DECISION

The Appellant's appeal is **GRANTED.**

ORDER

1. The Department will adjust the Appellant's AI effective [redacted] 2015 by excluding the $410.00 QDRO as available income from the Appellant's disability pension.

2. Compliance with this order is due to the undersigned within 15 days from the date of this decision.

Thomas Monahan
Thomas Monahan
Hearing Officer

C: Judy Williams, Operations Manager, Waterbury Regional Office
Karen Main, Operations Manager, Waterbury Regional Office
Lenora Riley, Hearing Liaison

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, 55 Farmington Avenue, Hartford, CT 06105.

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. 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, 55 Farmington Avenue, Hartford, CT 06105. 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/her 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.