

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

██████████ 2015  
SIGNATURE CONFIRMATION

CLIENT ID #: ██████████  
HEARING ID #: 710259

**NOTICE OF DECISION**

**PARTY**

██████████  
C/O Atty ██████████  
██████████  
██████████

**PROCEDURAL BACKGROUND**

On ██████████ 2015, the Department of Social Services (the "Department") sent ██████████ (the Appellant) a notice of its decision to impose a penalty against her application for Long Term Care Medicaid benefits because she transferred assets in order to become eligible for Medicaid.

On ███ ███ 2015, ██████████ ██████████, the Appellant's attorney requested an administrative hearing to contest the Department's decision to impose a penalty.

On ██████████ 2015, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling the administrative hearing for ██████████ 2015.

On ██████████ 2015 the Appellant's attorney requested a reschedule.

On ██████████ 2015 OLCRAH issued a notice rescheduling the hearing for ██████████ 2015.

On ██████████ 2015, in accordance with sections 17b-60, 17b-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:

██████████, Counsel for the Appellant  
██████████ Appellant's daughter and Power of Attorney  
Jacqueline Mastracchio, Department's representative  
Marci Ostroski, Hearing Officer

The hearing record remained open for the submission of additional evidence. On ██████████ 2015, the record closed.

### **STATEMENT OF THE ISSUE**

The issue to be determined is whether assets transferred by the Appellant result in a penalty period for Long Term Care Medicaid because the assets were transferred for less than fair market value, or whether the Appellant received compensation for some or all of the transferred assets under the terms of a legally enforceable agreement.

### **FINDINGS OF FACT**

1. The Appellant suffered a fall in 2009 and was subsequently institutionalized for a short term stay at Cherry Brook rehabilitation facility. (Power of Attorney's testimony)
2. When the Appellant was discharged from Cherry Brook it was under the instruction of the Social Worker that she do so only under the supervision of a live-in Caregiver. (Power of Attorney's testimony)
3. The Appellant began receiving live in caregiver services from individuals referred by the Polish Helping Hands after her discharge from Cherry Brook in 2009 at a cost of \$980 per week. (Power of Attorney testimony, Ex. 9: Itemization of Medical Expenses, Ex. 10: Letter from Power of Attorney to ██████████ dated ██████████/15)
4. On ██████████ 2011, the Appellant named her daughter as her Power of Attorney. (Ex. 2: Durable Power of Attorney agreement)
5. On ██████████ 2011, the Appellant entered into an Employment Services Agreement with her daughter. The Agreement refers to the Appellant as the Employer and the daughter as "the Care-Giver." (Ex. 4: Care-Giver Employment Contract)
6. The Agreement states in part that "the Employer will pay the Care-Giver weekly on the 1<sup>st</sup> day of each week at the following rates: \$18.00 per hour" (Ex. 4: Care-Giver Employment Contract)

7. The Agreement lists the following types of services that the Appellant's daughter agreed to perform: "housekeeping, laundry/change linens, garbage removal, dishwashing, errand running, grocery shopping, transportation, meal preparation, bathing/grooming, dressing, getting out of bed, getting around, feeding, nutrition/diet, exercise, medication reminders". (Ex. 4: Care-Giver Employment Contract)
8. The Agreement does not contain a definition of "24/7 care". (Ex. 4: Care-Giver Employment Contract)
9. The Agreement does not provide for a rate of compensation for "24/7 care". (Ex. 4: Care-Giver Employment Contract)
10. The Appellant temporarily moved in with her daughter [REDACTED] and resided with her from [REDACTED] 2011 through [REDACTED] 2012. (Power of Attorney testimony, Ex. 11: letter of rebuttal to 495A dated [REDACTED]/15)
11. There are 17 weeks and 5 days between [REDACTED] 2011 and [REDACTED] 2012.
12. During the time in which the Appellant was residing with her daughter, her daughter provided care as outlined in the Care-Giver Employment Contract. (Power of Attorney testimony)
13. It cannot be determined from the Record how many hours the daughter spent providing care to the Appellant as outlined in the Care-Giver Employment Contract. (Record)
14. The Appellant's daughter did not compensate herself at the time of the care giving in accordance with the Care-Giver Employment Contract. (Power of Attorney testimony)
15. When the Appellant returned to her home on [REDACTED] 2012 she did so with another live in caregiver. (Power of Attorney testimony)
16. The Appellant again temporarily moved in with her daughter [REDACTED] from [REDACTED] 2012 through [REDACTED] 2013. (Power of Attorney testimony, Ex. 11: letter of rebuttal to 495A dated [REDACTED]/15)
17. There are 3 weeks and 6 days between [REDACTED] 2012 and [REDACTED] 2013.
18. During the time in which the Appellant was residing with her daughter, her daughter provided care as outlined in the Care-Giver Employment Contract. (Power of Attorney testimony)

19. It cannot be determined from the Record how many hours the daughter spent providing care to the Appellant as outlined in the Care-Giver Employment contract. (Record)
20. The Appellant's daughter did not compensate herself at the time of the care giving in accordance with the Care-Giver Employment Contract. (Power of Attorney testimony)
21. The Appellant's daughter has not billed for, or provided an accounting of the homemaker or home health aide services she provided for the Appellant, and at which times, and for how many hours. (Record)
22. When the Appellant returned home on [REDACTED] 2013 she did so under the care of another live in caregiver. (Record)
23. The Appellant continued to pay the live in care givers at a rate of \$980 a week until [REDACTED] of 2013 at which time the rate increased to \$1680 a week. (Ex. 9: Itemization of medical expenses, checks to care giver and bank statement dated [REDACTED]/12-[REDACTED]/12, Ex. 10: Letter from "[REDACTED]" to "[REDACTED]" dated [REDACTED] 2015)
24. On [REDACTED] 2013 the Appellant transferred \$38,853.00 to her daughter [REDACTED]. (Ex. 3: W495-A Transfer of Assets Preliminary Decision Notice)
25. On [REDACTED] 2014, the Appellant was admitted to Evergreen Health Care Convalescent Home, a long term care facility. (Department's Summary)
26. On [REDACTED] 2015, the Appellant applied for Long Term Care benefits under Medicaid. (Department's Summary)
27. As part of the application process, the Department reviewed assets that were transferred by the Appellant during the 60 month look back period, to determine whether the Appellant received fair market value for the transferred assets. (Record)
28. On [REDACTED] 2015, the Department mailed the Appellant a Preliminary Decision Notice, advising her that the \$38,853.00 transferred to her daughter would be subject to a transfer of asset penalty. (Ex. 3: W-495A Transfer of Assets Preliminary Decision Notice)
29. On [REDACTED] 2015, counsel for the Appellant offered a rebuttal to the preliminary decision, arguing that [REDACTED] was reimbursed for the care she provided for the Appellant under the Agreement. The reimbursement was calculated as 23 weeks X \$1680 a week or \$10 an hour for 24 hours a day 7 days a week ("24/7"). (Ex. 11: letter of rebuttal to 495A dated [REDACTED]/15)

30. On [REDACTED] 2015, the Department mailed the Appellant a Final Decision Notice advising her that it has not changed its Preliminary Decision, and that the portion of assets she transferred which is subject to penalty is \$38,853.00. (Ex. 7: W-495C Transfer of Assets Final Decision Notice)

### **CONCLUSIONS OF LAW**

1. Section 17b-260 of the Connecticut General Statutes provides that the Department will administer Title XIX of the Social Security Act ("Medicaid") in the State of Connecticut.
2. Section 17b-261b(a) of the Connecticut General Statutes provides that the Department "shall be the sole agency to determine eligibility for assistance and services under programs operated and administered by said department."
3. Federal law provides that the "single State agency is responsible for determining eligibility for all individuals applying for or receiving benefits" in the Medicaid program. 42 C.F.R. 431.10(b)(3)
4. Subsection (a) of section 17b-261(a) of the Connecticut General Statutes provides that any disposition of property made on behalf of an applicant or recipient by a 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.
4. An applicant is "the individual or individuals for whom assistance is requested." Uniform Policy Manual ("UPM") 1500.01
5. The Appellant is the applicant in this matter. Disposition of property by the Appellant's powers of attorney are attributed to the Appellant.
6. Subsection (a) of section 17b-261a of the Connecticut General Statutes provides 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 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."
7. The Department uses the policy contained in Chapter 3029 of the Uniform Policy Manual to evaluate asset transfers if the transfer occurred on or after February 8, 2006. UPM § 3029.03.

8. There is a period established, subject to the conditions described in chapter 3029, 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).
9. The look-back date for transfers of assets is the 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).
10. The look-back date for the Appellant is [REDACTED] 2010.
11. Compensation in exchange for a transferred asset is counted in determining whether fair market value was received. UPM § 3029.30.
12. Compensation received prior to the time of the transfer is counted if it was received in accordance with a legally enforceable agreement. UPM § 3029.30 (A)(2)
13. Each form of compensation is assigned a dollar value to compare with the fair market value of the transferred asset. UPM § 3029.30 (B)
14. In determining the dollar value of services rendered directly by the transferee the Department uses the following amounts: a. for all services of the type normally rendered by a homemaker or home health aide, the current state minimum hourly wage for such services. b. For all other services, the value is the actual cost. UPM § 3029.30 (B)(1)(a)(b)
15. While the Appellant's daughter [REDACTED] [REDACTED] could be credited with providing compensation to the Appellant under the terms of the Agreement for however many hours of homemaker or home health aide services she provided the Appellant, at the hourly rates specified for those services, she has not established how many hours of homemaker or home health aide services she provided for the Appellant, so she is not entitled to any such credit under the terms of the Agreement for any of those hourly services she may have provided.
16. The Agreement does not contain a definition of or rate for "24/7" care.
17. The Department correctly determined that the transfer was not made in accordance with compensation because it was not in accordance with the legally enforceable agreement.
18. UPM 3029.20(B) addresses transfers made in return for other valuable

consideration and provides other valuable consideration must be in the form of services or payment for services which meet all of the following conditions:

1. the services rendered are of the type provided by a homemaker or a home health aide; and
  2. the services are essential to avoid institutionalization of the transferor for a period of at least two years; and
  3. the services are either:
    - a. provided by the transferee while sharing the home of the transferor; or
    - b. paid for by the transferee.
19. The Department correctly determined that the transfer was not made in accordance with other valuable consideration because the Appellant's daughter did not live with the Appellant for a period of at least two years.
20. UPM 3029.10(F) provides for transfers not resulting in a penalty; 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.
21. 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)
22. The Appellant did not establish with clear and convincing evidence that she transferred \$38,640.00 for a purpose other than qualifying for assistance, such as undue influence, her foreseeable needs were met, transfer to or by legal owner, or that the transferred asset would not affect her eligibility if retained.
23. The Department correctly determined that the Appellant did not receive fair market value for the transfer of \$38,640.00 to her daughter [REDACTED] in exchange for live in caregiver services for a period of 22 weeks (18 weeks between [REDACTED] 2011 and [REDACTED] 2012 and a period of 4 weeks between [REDACTED] 2012 through [REDACTED] 2013).
24. Fair market value for live in care giver services at the time that the Appellant lived with her daughter was \$980 a week. The Appellant lived with her daughter for 22 weeks (18 weeks + 4 weeks). Fair market value is \$21,560.00 (\$980.00\*22 weeks)

25. The Department was incorrect to find that the Appellant transferred \$38,640.00 for the purpose of qualifying for Long Term Care Medicaid.
26. The Appellant transferred \$17,080.00 (38,640.00-21,560.00) for the purpose of qualifying for Medicaid. She received fair market value for \$21,560.00.
27. 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. Uncompensated values of multiple transfers are added together and the transfers are treated as a single transfer. UPM § 3029.05(F).
28. UPM § 3029.05 (E)(2) provides that the penalty period begins as of the later of the following dates: 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.
29. UPM § 3029.05 (F) provides in part that 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. 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. For applicants, the average monthly cost for LTCF services is based on the figure as of the month of application.
30. The average monthly cost of LTCF services in Connecticut as of the month of the Appellant's application was \$11,851.00.
31. The Appellant is subject to a penalty period of 1.44 months after dividing the uncompensated value of the transferred asset by the average monthly cost of LTCF services (\$17,080.00, divided by \$11,851.00).

### **DISCUSSION**

The Department's determination that the Appellant transferred assets to qualify for assistance is upheld. The transfer is not in accordance with the regulations that govern compensation or other valuable consideration and is therefore improper.

There is a fair market value, however for the care that that Appellant's daughter provided to her. Prior to and subsequent to the time period that the Appellant was living with her daughter she was paying live in caregivers \$980 a week. The daughter, having testified that she provided the same care as the live in



caregivers would be entitled to receive the same payment for those services.

The calculations that the Appellant's daughter and attorney used are incorrect. They allowed for \$1380 a week for 23 weeks. Evidence and testimony support the fact that the live in caregivers only began receiving \$1380 a week in 2013 when the needs of the Appellant increased. The dates that the Appellant's daughter provided also only add up to 22 weeks of care.

### **DECISION**

The Appellant's appeal is **DENIED** with respect to the imposition of a penalty and **GRANTED** with respect to the amount and length of the penalty.

### **ORDER**

1. The Department is ordered to amend the TOA penalty imposed from \$38,640.00 to \$17,080.00 and decrease the length of the penalty period to 1.44 months

2. Proof of compliance with this order is due to the undersigned no later than [REDACTED] 2015

*Marci Ostroski*

Marci Ostroski  
Hearing Officer

CC: Peter Bucknall, Lisa Wells, Social Service Operations Managers, DO #20  
Bonnie Shizume, Social Service Program Manager, DO #20  
John Hesterberg, Social Service Operations Manager, DO #11

### **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 Administrative Hearings and Appeals, 55 Farmington Avenue, Hartford, CT 06105-3725.

### **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, 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 the Commissioner's 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.