

STATE OF CONNECTICUT  
DEPARTMENT OF SOCIAL SERVICES  
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS  
25 SIGOURNEY STREET  
HARTFORD, CT 06106-5033

██████████ 2017  
Signature Confirmation

Client ID # ██████████  
Request #785019

NOTICE OF DECISION

PARTY

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██████████  
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██████████

PROCEDURAL BACKGROUND

On ██████████ 2016, the Department of Social Services (the "Department") sent ██████████ (the "Appellant") a Notice of Action ("NOA") setting up a Transfer of Assets ("TOA") penalty period for Long Term Care ("LTC") Medicaid, for a period of 23.88 months.

On ██████████, 2016, the Appellant's Conservator of Estate, ██████████ (also, Appellant's "Significant Other" or "SO"), requested an administrative hearing on behalf of the Appellant to contest the Department's decision to impose such penalty period.

On ██████████ 2016, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a Notice scheduling the administrative hearing for October 5, 2016.

On ██████████ 2016, at the request of the Appellant's representative's legal counsel, OLCRAH issued a notice rescheduling the hearing for ██████████, 2016.

On ██████████, 2016, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-184, inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing.

The following individuals were present at the hearing:

██████████ Appellant's Conservator of Estate

[REDACTED] Counsel for [REDACTED]  
 [REDACTED] Family Friend, [REDACTED]  
 [REDACTED] Appellant's sister  
 Michelle Massicotte, Department's Representative  
 Michael Briggs, Department's Representative  
 James Hinckley, Hearing Officer

### STATEMENT OF THE ISSUE

The issue is whether the Department's decision to impose a penalty period of ineligibility for payment of LTC nursing costs because the Appellant disposed of assets for less than fair market value, was correct.

### FINDINGS OF FACT

1. On [REDACTED] 2015, the Appellant was institutionalized in a long term care facility. (Hearing Record)
2. On [REDACTED] 2016, the Appellant applied to the Department for Medicaid for long term care. (Ex. 1: W-1 LTC Application form)
3. Between [REDACTED] 2015 and [REDACTED] 2016, the Appellant transferred to her SO, assets totaling \$290,647.60. (stipulated by the parties)
4. On [REDACTED] 2016, the Department notified the Appellant of its preliminary decision that the transfers made between [REDACTED] 2015 and [REDACTED] 2016 were made in order to be eligible for assistance. (Ex. 3-A to Ex. 3-K: Transfer of Assets Preliminary Decision Notice(s), Hearing Record)
5. On [REDACTED] 2016 the Appellant died. (Hearing Record)
6. On [REDACTED], 2016, the Department sent the Appellant/her representative notification that it did not agree with her rebuttal claim, and that a penalty period would be set up. (Ex. 4: W-495B Transfer of Assets Notice of Response to Rebuttal/Hardship Claim)
7. On [REDACTED] 2016, the Department sent the Appellant/her representative notification of its final decision that the Appellant transferred \$290,647.60 in order to become eligible for Medicaid, and that there would be a penalty period beginning on [REDACTED] 2015 and ending on [REDACTED] 2017 during which time Medicaid would not pay for any long-term care medical services. (Ex. 5: W-495C Transfer of Assets Final Decision Notice)

#### Prior to the Appellant's institutionalization

8. The Appellant and her SO ([REDACTED]) were life partners, and lived together continuously at the same address since 1972. (SO's testimony)

9. The Appellant was diagnosed with Stage II lung cancer in 2004, and later, the lung cancer metastasized to her brain. (Ex. 11: Medical Records, 457 pages [REDACTED]/13-present, p. 67: [REDACTED] MD Oncology Report [REDACTED]/04)
10. The Appellant's lung cancer was treated in 2004 with surgery and chemotherapy. (Ex.11, pp.63-70: [REDACTED] MD [REDACTED]/04 [REDACTED]/04 [REDACTED]/04 [REDACTED]/04)
11. The Appellant's metastatic disease to her brain was treated in 2008 with surgery and radiation.
  - a. "She is status post lobectomy and solitary brain mets resection in 2008. She had brain surgery in 2008" (Ex. 11, p.175: [REDACTED] MD [REDACTED]/14)
12. In the years following her treatment for cancer, the Appellant suffered a progressive decline in health. (Ex. 11)
13. The surgery and radiation the Appellant received to her brain caused certain medical problems to develop years later.
  - a. "Past Medical History: History of seizures with new onset a year ago. She was placed on Keppra, mostly related to metastatic lung disease of the brain" (Ex. 11, p.437: [REDACTED] MD [REDACTED]/12)
  - b. "Postoperative findings status post remote prior right parietal craniotomy and tumor resection", "Chronic appearing tissue loss in the right parietal lobe at the site of prior tumor", "chronic appearing white matter changes" (Ex. 11, pp. 51-52: MRI of the head results [REDACTED] 13)
  - c. "there is prominent decreased attenuation in the right parietal lobe with decreased PET activity consistent with encephalomalacia" (Ex. 11, p. 53: PET/CT Restage Lung Cancer results [REDACTED]/13)
  - d. "MRI of the brain...demonstrates gliosis and scarring from the previous parietal lobe lesion resection as well as the effects of radiation treatment to the brain" (Ex. 11, p.114: [REDACTED] Hospital Discharge Summary, [REDACTED] MD [REDACTED]/15)
  - e. "has a known history of gait ataxia occurring after the radiation treatment and then surgical resection of the right parietal lung tumor" (Ex. 11, p.113: [REDACTED] MD [REDACTED]/15)
14. Among the Appellant's notable medical problems were chronic gait disturbance, COPD with oxygen use, chronic fatigue, vision problems, memory problems, dizziness, balance difficulties, sudden tremors of her legs with weakness and loss of control, and repeated urinary tract infections. (Ex. 11)
15. Separate from her chronic gait disturbance, the Appellant periodically experienced acute episodes of weakness, tremors and loss of control of her legs with inability to move.
  - a. "...bilateral leg shaking that occurred earlier this evening. She states that the symptoms lasted about 45 minutes. She noted tremors in both legs" (Ex. 11,

p.27: [REDACTED] MD [REDACTED]/12)

- b. "I am not sure if the leg shaking is a mild seizure, she does not have it often..." (Ex. 11, p.170: [REDACTED] MD [REDACTED]/14)
- c. "She presented to us here in [REDACTED] again [REDACTED] [REDACTED] complaining of weakness in her lower extremities, was unable to move her legs. She had to be carried into the car by neighbors and brought to the Emergency Room for evaluation" (Ex. 11, p.162 [REDACTED] MD [REDACTED]/14)
- d. "The patient has apparently had episodes, where her legs will shake and she is unable to stand and this can sometimes last for half an hour or more" (Ex. 11, p.113: [REDACTED] MD [REDACTED]/15)

16. The Appellant experienced frequent falls.

- a. "Reports she has had 'many falls'" (Ex. 11, p.21: [REDACTED] PA [REDACTED]/14)
- b. "More falls/stumbling lately", "There have been other recent falls but her memory of them is not as clear. Says she always has bumps and bruises" (Ex. 11, p.25: [REDACTED] PA [REDACTED]/14)
- c. "She falls frequently, up to 3 times a week" (Ex. 11, p.177: [REDACTED] MD [REDACTED]/14)

17. The Appellant was chronically noncompliant with medical advice to use a walker; she ambulated at home either independently, or with the use of a cane.

- a. "pt ambulates prn w/cane, ambulated independently in home and was unsteady at times, pt aware she should use cane more often but states 'I do not'" (Ex. 11, p.32: [REDACTED] Visiting Nurse Association Clinical Note, [REDACTED] BSN [REDACTED]/13)
- b. "Encouraged pt to use cane in home (she was not during this hv) pt states she will however, she did not during entire visit" (Ex. 11, p.33: [REDACTED] Visiting Nurse Association Clinical Note, [REDACTED] BSN [REDACTED]/13)
- c. "Has refused to use cane in past, is now using cane but won't use walker" (Ex. 11, p. 25: [REDACTED] PA [REDACTED]/14)
- d. "Walks with a cane" (Ex.11, p.22: [REDACTED] PA [REDACTED]/14)
- e. "She ambulates with the aide of a cane" (Ex. 11, p.175: [REDACTED] MD [REDACTED] 14)
- f. "She continues to be noncompliant with the walker" (Ex. 11, p. 162: [REDACTED] MD [REDACTED]/14)
- g. "Ambulates with the aid of a cane though she has been told to use a walker" (Ex. 11, p.177: [REDACTED] MD [REDACTED]/14)
- h. "noncompliance with walker use" (Ex. 11, p. 202: [REDACTED] PA [REDACTED]/14 date of encounter)

18. While she was living at home, the Appellant was mostly independent with her ADLs (activities of daily living) throughout the course of her everyday life.

- a. "Comments pt independent with adl's and personal care..." (Ex. 11, p.33: [REDACTED] Visiting Nurse Association Clinical Note, [REDACTED] BSN [REDACTED]/13)

- b. "Pt has made great progress and has met all her goals. Pt has returned to PLF (prior level of function) and is IND (independent) with all ADLs". (Ex. 11, p.140: ██████████ Visiting Nurse Association Discharge Summary, ██████████ OT ██████/14)
- c. "Goals Status: Met for return to independent self care with minimal set up of all clothing etc. to avoid bending down or reaching up for object retrieval purposes" (Ex. 11, p. 138: ██████████ Visiting Nurse Association Agency Discharge Summary ██████/14)

19. The SO did not provide care for the Appellant on any regular or consistent basis, and was often not at home with the Appellant.

- a. "She has an SO but he spends the day 'at the bar or the coffee shop with friends'" (Ex. 11, p.3: ██████████ PA ██████/13)
- b. "She does not have reliable help at home from her SO, no reliable transportation", "I have concerns about her home environment and safety. Her gait and vision are worsening (late radiation/post-surgical complications), she has an unexplained contusion, questionable med compliance. She would benefit from VNA services and a safety assessment". (Ex. 11, pp. 18-19, ██████████ PA ██████/13)
- c. "She is alone much of the day". (Ex. 11, p. 25: ██████████ PA ██████/14)
- d. "Aftercare Planning Recommendations: concerns regarding care after surgery and household member available to render care (but not clearly reliable – please make note of this. Patient is high risk for recurrent falls). (Ex. 11, p.80, ██████████ PA ██████/15)
- e. "Safety awareness is limited as is help and support at home" (Ex. 11, p.81: ██████████ PA ██████/15)
- f. "the patient does not have good social support" (Ex. 11, p.82: ██████████ PA ██████/15)
- g. "She is stable from a medical standpoint and safe to go home with assistance. It is not clear if her SO is around often enough to assist when needed". (Ex. 11, p.91: ██████████ PA ██████/14)

20. The SO was not present on several occasions when the Appellant suffered acute medical emergencies.

- a. "Says was standing in kitchen evening of ██████████, legs started to shake, felt "weird", went into living room and sat on couch", "Called SO and he came home and took her to ER" (Ex. 11, p.428: ER Follow up ██████████ PA ██████/12)
- b. "She tells me that yesterday she was home and she had an episode while sitting on the couch of her legs suddenly starting to shake and her arms felt weak. She did get up and walk around, but then she felt slightly lightheaded without a spinning sensation, and she called her significant other to come home from work. When he came home he took her to the Emergency Room". (Ex. 11, p. 168: ██████████ Hospital Consultation Report, ██████████ MD ██████/14)
- c. "She presented to us here in ██████████ again ██████████, complaining of

weakness in her lower extremities, was unable to move her legs. She had to be carried into the car by neighbors and brought to the Emergency Room for evaluation". (Ex. 11, p. 161: [REDACTED] Hospital Stat Discharge Summary, [REDACTED] MD [REDACTED] 4/14)

- d. "[REDACTED] had a fall and broke right (dominant) arm "trying to throw something wet over the shower curtain rod". Says entire body went into the bathtub and landed on R arm. Brought by ambulance to [REDACTED] ER where dx was made by xrays". (Ex. 11, p. 81: [REDACTED] PA [REDACTED] /15)
  - e. "Diagnoses: Acute Urinary Tract Infection, Weakness", "Her significant other came home at 8:00, and found her on the couch, she was awake but she could not get off of the couch" (Ex. 11, p.181: [REDACTED] MD [REDACTED] /15)
21. In [REDACTED] 2014-[REDACTED] 2014, the SO went on a five-week trip to Switzerland to visit family. The Appellant did not have supervision when the SO left for his trip, because the SO did not make concrete arrangements for the Appellant to be supervised while he was away; he spoke with the Appellant's sister in Florida and was under the impression that the sister would be coming up to stay with the Appellant while he was away, but the sister never showed up. (SO's testimony, Hearing Record)
22. As late as [REDACTED] 2015 in the progressive decline in the Appellant's state of health, the SO did not believe that the Appellant required 24 hour supervision or needed durable medical equipment (DME) to assist with her safety in the home.
- a. "The amount of supportive services are not adequate in the face of the fact that neither the pt. nor her caregiver feel the need to provide 24 hr supervision unless it is covered under entitlement programs. Recommendations of necessary DME have also been rejected for the same reasons", "refusal on the pt's part as well as her SOs to provide adequate supervision & DME necessary for her safety" (Ex. 11, pp. 129-130: [REDACTED] [REDACTED] PT [REDACTED] /15)
23. The Appellant's typical capacity to independently perform her ADLs was diminished for periods of time on several occasions, while she was recovering after the occurrence of a serious acute medical event; the Appellant received services from VNA occupational and physical therapists and from Meals on Wheels during those times. (Ex. 11)
24. On occasions when the Appellant had reduced capacity to perform her ADLs, such as after she broke her arm on [REDACTED] /15, the SO provided the Appellant with some help in addition to the care provided by her caregivers.
- a. "PT is calling in due to a fall at home she was seen in the ER and RT arm is broken and put in cast would like to get a Home health aide she also states it is very difficult to wal(k)" (Ex. 11, p.216: [REDACTED] RN [REDACTED] /15)
  - b. "her R arm fracture has further compromised her balance, gait and ability to transfer safely", "VNA coming twice a week, working on a caregiver to come a few times a week. Says hard to get around, is essentially using her SO (he

takes her by the arm) which is how she feels most comfortable. She is receiving meals on wheels and has not had difficulty eating adequate meals. Able to toilet with minimal assistance (calls SO in the night if needed)". (Ex. 11, p.82 [REDACTED] PA [REDACTED]/15)

- c. "SO answered the phone. She stated the VNA and [REDACTED] nursing were both taking care of her. Added that her 'SO is doing a very good job helping me'" (Ex. 11, p.213: [REDACTED] RN [REDACTED]/15)

25. The help that the SO provided to the Appellant at those times when her capacity to perform ADLs was diminished did not include substantial help with performing ADLs; after the Appellant broke her right arm on [REDACTED] 2015, her hygiene declined, because she was no longer independently able to bathe herself, and because the SO was not assisting her in bathing.

- a. "Safety awareness is limited as is help and support at home. She has had recurrent falls and displays poor judgment", Her attention to hygiene has declined with her inability to bathe and this was evident at the visit today". (Ex. 11, p.81: [REDACTED] PA [REDACTED]/15)

26. The SO provided the Appellant with only minimal help in performing her ADLs, and only on an intermittent basis, since she was mostly independent with her ADLs except for when she was acutely less capable while recovering from a medical incident, and since the help that the SO provided during those times when the Appellant was recovering from an acute medical incident was only supplemental to the help she received from outside agencies. (Facts #18, #19, #23, #24, #25)

27. The SO performed several housekeeping chores at home on a regular basis, including housecleaning, laundry and meal preparation, and helped the Appellant with transportation on a regular basis since she was unable to drive due to vision problems. (SO's testimony, Hearing Record)

28. The SO did not believe that the Appellant required full-time supervision, and did not provide her with full time supervision. (SO's testimony, Facts #19, #20, #21,#22)

29. None of the Appellant's medical caregivers ever suggested that the Appellant might require long term institutionalization prior to [REDACTED] 2015, when the possibility was first brought up.

- a. "Will require VNA referral and pt is also open to considering short-term rehab admission (may, however require long term). Will initiate appropriate referrals. Pt. and her SO agree to this". (Ex. 11, p.81: [REDACTED] PA [REDACTED]/15, Hearing Record)

30. The assertion in the Affidavit from [REDACTED] M.D. dated [REDACTED] 2015, that the Appellant would have required institutionalization as of [REDACTED] 2012, is not credible because Dr. [REDACTED] had limited knowledge of the Appellant's functional abilities in her home during that period, and because the conclusion is not supported by the

bulk of the medical evidence. (Appellant's Exhibit A, p.10: Affidavit from [REDACTED] M.D., Hearing Record)

31. The assertion in the Affidavit from [REDACTED] M.D. dated [REDACTED] 2016, that the Appellant would have required institutionalization as of [REDACTED] 2012, is not credible because Dr. [REDACTED] had limited knowledge of the Appellant's functional abilities in her home during that period, and because the conclusion is not supported by the bulk of the medical evidence. (Appellant's Exhibit A, pp. 11-12: Affidavit from [REDACTED] M.D.)
32. The Appellant did not have a need for long term institutionalization for a full two years prior to the date she was actually institutionalized on [REDACTED] 2015. (Hearing Record)

### **CONCLUSIONS OF LAW**

1. The Department is the state agency 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. 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
5. 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)
6. 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)
7. The look-back date for the Appellant is [REDACTED] 2011.



8. The \$290,647.50 in assets transferred by the Appellant to the SO were transferred after the lookback date.
9. 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)
10. A transfer of an asset is considered to be for the purpose of qualifying for Medicaid if all of the following circumstances apply: A. Fair market value is not received; and B. There is no convincing evidence that the transfer is for another purpose; and C. The transferor does not retain sufficient funds for foreseeable needs. UPM § 3025.10
11. Compensation in exchange for a transferred asset is counted in determining whether fair market value was received. UPM § 3029.30
12. 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)
13. The Appellant did not receive compensation in exchange for the transferred assets, or retain sufficient funds for her foreseeable needs.
14. 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 in return for other valuable consideration. The value of the other valuable consideration must be equal to or greater than the value of the transferred asset in order for the asset to be transferred without penalty. (Cross Reference: 3029.20) UPM § 3029.10(G)
15. UPM Section 3029.20 provides for the general principles and criteria for transfers made in return for other valuable consideration as follows:
  - A. General Principles
    1. Other valuable consideration may be received either prior to or subsequent to the transfer.
    2. The value of the other valuable consideration, computed as described in 3029.20 A. 3, must be equal to or greater than the value of the

transferred asset in order for the asset to be transferred without penalty.

3. The value of the other valuable consideration, as described in 3029.20 B, is equal to the average monthly cost to a private patient for long-term care services in Connecticut, multiplied by the number of months the transferee avoided the need for the transferor to be institutionalized.

(Cross Reference: P-3029.30)

B. Criteria for Other Valuable Consideration

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.

16. The services provided to the Appellant by the SO did not meet the criteria for Other Valuable Consideration. The services were not essential to avoid institutionalization of the Appellant for a period of at least two years; the Appellant did not require institutionalization for a period of at least two years.

17. The Appellant did not receive nor intended to receive other valuable consideration in return for the \$290,647.60 that she transferred to her SO.

18. The Appellant did not provide clear and convincing evidence to rebut the presumption that the transfer of \$290,647.60 was made with the intent to obtain/maintain eligibility for medical assistance.

19. The penalty period begins as of the later of the following dates: 1. 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 2. 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)

20. The Appellant's penalty period begins [REDACTED] 2015, the date on which she would otherwise be eligible for Medicaid payment for long term care services.

21. UPM § 3029.05 provides for the length of the penalty period and nature of the penalty as follows:

F. Length of the Penalty Period

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

G. Medicaid Eligibility During the Penalty Period

1. During the penalty period, the following Medicaid services are not covered:
  - a. LTCF services; and
  - b. services provided by a medical institution which are equivalent to those provided in a long-term care facility; and

- c. home and community-based services under a Medicaid waiver.
2. Payment is made for all other Medicaid services during a penalty period if the individual is otherwise eligible for Medicaid.
22. The average monthly cost for LTCF services was \$12,170 as of the month of the Appellant's application.
  23. The Appellant's transfer of \$290,647.50 results in a transfer of asset penalty for 23.88 months (\$290,647.50 divided by \$12,170).
  24. The Department correctly determined that the Appellant was not eligible for payment of LTCF services during the 23.88 month penalty period beginning [REDACTED] 2015 and ending [REDACTED] 2017.

### DISCUSSION

The executor of The Appellant's estate and his attorney argued that no penalty period of ineligibility should be imposed against the Appellant for transferring assets, because they claim the Appellant received other valuable consideration in exchange for the transferred assets.

In deciding whether other valuable consideration was received, I considered the SO's affidavits, as well as the affidavits from Drs. [REDACTED] and [REDACTED], and the testimony of witnesses, but placed the greatest weight on the 457 pages of medical records. The medical records provided greater detail regarding the Appellant's medical condition and home circumstances at various times. The complete medical records also provided chronology and context that proved useful in evaluating whether the SO's care was essential to avoid the Appellant's institutionalization for two years or more.

While both doctors' affidavits contained accurate information regarding the Appellant's health, some assertions regarding the Appellant's functional capacity at home were of questionable accuracy. For example, Dr. [REDACTED] affidavit stated that "by the end of 2011, [REDACTED] had become unable to walk without a walker...". The medical records show clearly that although that Appellant was advised to use a walker, she was chronically noncompliant with that medical advice and almost always walked either unaided, or with the use of a cane only.

In considering the Doctors' affidavits, it is significant to note that neither Dr. [REDACTED] nor Dr. [REDACTED] ever provided care for the Appellant in her home, and neither had any direct knowledge regarding what care, if any, the SO actually provided to the Appellant. Dr. [REDACTED] affidavit stated only that "*It is my understanding that [REDACTED] received the assistance she required from [REDACTED]*", and Dr. [REDACTED]'s affidavit similarly stated "*It is my understanding that [REDACTED] received from Mr. [REDACTED] the daily assistance she required*". (Emphasis added) The doctors also had less knowledge about what care the Appellant required in her home than the caregivers who provided

her with hands on care. The caregivers who actually visited the Appellant at her home, and witnessed and tested her functional capabilities to perform her ADLs, and saw her home environment, had more knowledge about the Appellant's actual abilities and requirements, and their accounts deserve greater weight. The evidence shows that during the two years prior to her actual institutionalization, the Appellant was mainly independent with her ADLs, except during those times when she was recovering from an acute illness or injury. The Appellant would not have required institutionalization during that time due to a need for significant help in performing her ADLs; she had no such need.

A second argument made in both doctors' affidavits as to why the Appellant would have required institutionalization, besides her need for assistance with ADLs, was her need for full-time supervision for safety. Dr. ██████ stated in his affidavit, "She also was unable to safely go down the stairs leading from the house, making it impossible for her to safely exit the house in the event of a fire. At that point, she was unable to live alone" and, "She also required full-time supervision to provide assistance in the event of an emergency to help her exit the house". Dr. ██████ stated in her affidavit, "She also could not safely exit the house in the event of a fire".

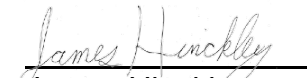
The record shows that the Appellant was often alone and without supervision during that two-year period. On several occasions when the Appellant needed assistance, the SO was not at home, and she had to call him on the telephone, or wait until he came home from work. On one occasion, the SO was in Europe when the Appellant experienced a medical episode requiring an emergency room visit, and the Appellant had to be assisted by neighbors. In his testimony, the SO disputed one account in the medical records of an injury sustained by the Appellant on ██████ 2014 which described the Appellant as being unsupervised at the time (Ex. 11, p.25). The account stated that, after a fall, the Appellant had to lay naked on the bathroom floor for twenty minutes while she waited for the SO to come inside from smoking in the car. The SO testified that the account was untrue, and that he was actually right next to the Appellant when the fall happened. I found the SO's testimony credible that the Appellant was not always an accurate reporter or historian. The medical records show that the Appellant suffered many progressive complications from the brain radiation she received, including confusion and memory problems. As such, I did not necessarily consider verbatim statements from her as they were recorded in the medical records to reflect the absolute truth of the matter, but rather considered them in the context of the record as a whole. But even if it is correct that the SO was present on that occasion, on many other occasions he was not. And since the accident still happened, it is questionable whether his mere presence in the home equated to providing adequate supervision for the Appellant.

While the doctors' affidavits asserted that the Appellant needed full-time supervision, the SO, himself, never made that argument. The SO never argued that he provided the Appellant with full-time supervision, and did not dispute that he was not always at home with the Appellant. If the SO admits that he did not provide full time supervision, he cannot successfully argue that full-time supervision was the basis of the Appellant's

need for institutionalization which his care prevented.

**DECISION**

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

  
James Hinckley  
Hearing Officer

cc: Carol Sue Shannon, SSOM, Danbury  
Thomas Murphy, Esq.

### **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, 25 Sigourney Street, Hartford, CT 06106-5033.

### **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 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.