BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JUL 29 2013

Petitioner,	:	
	:	**Docket No.:**
v.	:	**OSAH-DFCS-NH- -Miller**
DHS, FAMILY & CHILDREN SERVICES,	:	
Respondent.	:	

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by the Petitioner, of a decision by the Department of Human Services, Division of Family and Children Services ("Department"), Respondent herein, to impose a transfer of assets penalty in conjunction with its approval of the Petitioner's application for Aged, Blind, or Disabled/Nursing Home Medicaid.

The evidentiary hearing took place on June 17, 2013.[1] J. Kevin Tharpe, Esq., represented the Petitioner, and Bevin Brown, Esq, represented the Department. For the reasons set forth below, the Department's decision to impose a transfer of assets penalty is **AFFIRMED**; provided, however, that the case is **REMANDED** for a recalculation of the duration of the penalty period in accordance with this decision.

[1] The record closed on July 1, 2013, following the submission of the parties' written closing arguments and legal briefs.

II. FINDINGS OF FACT

1.

The Petitioner is eighty-four years old and resides at Bell Minor Nursing Home ("Bell Minor" or "the nursing home") in Gainesville, Georgia. The Petitioner entered Bell Minor in February 2012. Thereafter, on March 7, 2012, she applied for Medicaid assistance under the Aged, Blind, or Disabled/Nursing Home class of assistance. (Testimony of Carol Whitmire; Exhibit R-6.)

A. The Petitioner's Application Prior to the Death of Her Spouse

2.

At the time the Petitioner entered the nursing home and applied for Medicaid, she was married to Mr. , who continued to reside in the couple's home, was designated the "community spouse" for purposes of the Petitioner's Medicaid application. The Petitioner, in turn, was designated the "institutionalized individual." Regrettably, Mr. died on May 11, 2012,[2] during the pendency of the Petitioner's application. (Testimony of Ms. Whitmire and Kathanette Barnes; Exhibit R-6.)

3.

When an institutionalized individual with a community spouse applies for Medicaid, the Department considers the couple's combined resources in determining the applicant's eligibility. Here, because the Petitioner was married when she entered the nursing home and applied for Medicaid, the Department considered the resources of both the Petitioner and Mr. as they existed at that time, subject to a five-year look-back period. The Department was

[2] Prior to his death, Mr. was hospitalized and subsequently discharged to a nursing home. In April 2012, he, too, applied for Nursing Home Medicaid, but he died before a decision could be made on his application. (Testimony of Carol Whitmire.)

authorized to approve the Petitioner's application only if the couple's combined resources did not exceed $115,640.00.[3] (Testimony of Ms. Barnes; Economic Support Services Manual of the Georgia Department of Human Services at 3480-3539 ("Medicaid Manual")[4] § 2502 and Appx. 1 (2012).)

4.

When the Petitioner entered Bell Minor and applied for Medicaid, few of the couple's assets were titled in her name. Instead, most of their assets had either been placed solely in Mr. 's name or made part of a trust established by Mr. . (Testimony of Ms. Whitmire.)

5.

On January 17, 2008, Mr. established a revocable living trust known as "The Ray Odell Satterfield Revocable Living Trust" ("Trust"). Mr. was the grantor and sole beneficiary of the Trust during his lifetime. His access to the Trust was unrestricted, and he could revoke the Trust at any time. Therefore, the corpus of the Trust was considered a countable resource of the couple during Mr. 's lifetime. (Testimony of Ms. Whitmire and Ms. Barnes; Exhibit R-27.)

6.

While Mr. was alive, he placed some of his assets in the Trust and retained others in his name. However, simultaneous with his creation of the Trust, he executed a will that poured the remainder of his assets into the Trust when he died. The s' daughter,

[3] Of this amount, $113,640.00 was a community spouse resource allowance allocated to Mr. , while $2,000.00 was an individual resource allowance allocated to the Petitioner. However, the resources of both spouses were combined and applied to the total resource limit. (Testimony of Ms. Barnes; Medicaid Manual § 2502 and Appx. 1 (2012).)

[4] Official notice of the Medicaid Manual was taken pursuant to the Notice of Hearing issued on January 14, 2013. See Court file.

Connie Braselton, became the trustee and sole beneficiary of the Trust upon Mr. 's death. (Testimony of Ms. Braselton; Exhibits R-27, R-28.)

7.

Mr. placed three parcels of real property, with values totaling $176,375.00,[5] in the Trust at the time it was created, as follows:

- the couple's homeplace property, located at 13 Capri Terrace, Gainesville, Georgia 30504, valued at $101,309.00;
- real property located at 3224 Hilltop Circle, Gainesville, Georgia 30504, valued at $5,411.00; and
- real property located at 3228 Hilltop Circle, Gainesville, Georgia 30504, valued at $69,655.00.

For the purpose of determining the Petitioner's Medicaid eligibility prior to Mr. 's death, the Department considered all three properties to be countable resources of the couple.[6] (Testimony of Ms. Whitmire; Exhibits R-25, R-26, R-27; Medicaid Manual §§ 2329, 2338.)

8.

At the time the Petitioner entered the nursing home and applied for Medicaid, Mr. and/or the Trust owned six annuities,[7] which are itemized below.

- United American Deferred Annuity Policy No. 00-1640360 was purchased for $10,000.00 on October 7, 1997, and surrendered to Mr. on April 10, 2012, in the amount of $19,048.26. (Exhibits R-16, R-17.)
- AIG (Western Life) Deferred Annuity Policy No. 2FC2266209 was purchased for $30,034.36 on September 22, 2003. The Petitioner did not provide the

[5] The valuation figures represent the fair market value of the properties reflected in the records of the Hall County Tax Assessor for the tax year 2012. (Exhibit R-25.)

[6] The Petitioner conveyed her interest in the properties to her husband by quitclaim deed on January 17, 2008, the same date that the Trust was established. (Exhibits P-15, R-27.)

[7] The Petitioner erroneously reported to the Department that Mr. owned seven annuities. However, although Mr. purchased United American Deferred Annuity Policy No. 00-1640361 on October 7, 1997, with a premium payment of $23,014.94, the account was surrendered to Mr. Satterfield on April 1, 2008. (Exhibits R-16, R-31.)

Department with documentation of the disposition of this annuity or its value at the time of disposition. (Exhibit R-15.)

- AIG (Western Life) Deferred Annuity Policy No. 4FK00010 was purchased for $100,000 on March 24, 2008, and surrendered to the Trust on April 23, 2012, in the amount of $118,535.23. (Exhibits R-21, R-22.)

- Metropolitan Life Deferred Annuity Policy No. 8100623369 was purchased for $30,068.18 on December 16, 2008, and was owned by the Trust. The annuity was cancelled upon Mr. 's death, and proceeds totaling $32,307.13 were paid to Ms. Braselton on September 12, 2012. (Exhibit R-18.)

- Principal Life Deferred Annuity Policy No. 8695541 was purchased for $100,000 on February 4, 2008, and was owned by Mr. The annuity was cancelled upon Mr. 's death, and proceeds totaling $120,544.46 were paid to Ms. Braselton on October 16, 2012. (Exhibit R-20, R-21.)

- Genworth Single Premium Immediate Annuity Policy No. 3903286 was purchased for $70,601.67 on February 4, 2008, and was owned by Mr. . Beginning on August 4, 2012, after Mr. died, the annuity began making monthly payments of $750.00 to Ms. Braselton. The annuity payments are scheduled to end on May 4, 2017. However, the Petitioner did not provide the Department with documentation of the present value of the annuity. (Exhibits R-19, R-20, R-21.)

For the purpose of determining the Petitioner's Medicaid eligibility prior to Mr. death, the Department considered all six annuities to be countable resources of the couple. (Testimony of Ms. Whitmire and Ms. Barnes; Medicaid Manual §§ 2338, 2339.)

9.

The Petitioner, Mr. , and/or the Trust held four bank accounts. As of Mr. 's death on May 11, 2012,[8] these accounts contained funds totaling $16,425.66, as follows:

[8] Following Mr. 's death, it appears from the record that a fifth account, United Community Bank Account No. 2013129867, was opened in the name of the Trust. The assets in this account have not been considered for purposes of this decision, based on a presumption that the funds in this account were transferred from other assets that have been itemized elsewhere. (Testimony of Carol Whitmire; Exhibit R-9.)

- United Community Bank Account No. 201310876, which was owned by the Trust, contained $3,045.10. (Testimony of Ms. Whitmire; Exhibit R-12.)

- United Community Bank Account No. 2013104605, which was jointly owned by the and Ms. Braselton, contained $2,737.15.[9] (Testimony of Ms. Whitmire; Exhibit R-10.)

- Regions Bank Account No. 0166498295, which was jointly owned by Mr. and Ms. Braselton, contained $7,286.28. (Testimony of Ms. Whitmire; Exhibit R-11.)

- Regions Bank Account No. 6441478072, which was jointly owned by the Petitioner and Mr. Satterfield, contained $3,357.13. (Testimony of Ms. Whitmire; Exhibit R-13.)

For the purpose of determining the Petitioner's Medicaid eligibility prior to Mr. 's death, the Department considered all four accounts to be countable resources of the couple. (Testimony of Ms. Whitmire; Medicaid Manual §§ 2334, 2338.)

10.

The Petitioner owned three life insurance policies, as follows:

- ING Life Insurance Company Policy No. 6103320432, which was issued in 1949 and valued at $813.00 upon her death, with her estate as the beneficiary (Exhibit R-24);

- ING Life Insurance Company Policy No. 6103851235, which was issued in 1954 and valued at $500.00 upon her death, with her estate as the beneficiary (Exhibit R-24); and

- IA American Life Insurance Company Policy No. 98061340101, which was issued in 1998 and valued at $6,171.00 upon her death, with Memorial Park Funeral Homes as the beneficiary (Exhibit R-24).

For the purpose of determining the Petitioner's Medicaid eligibility, the Department did not consider her life insurance policies to be countable resources of the couple, as they were valued

[9] The Petitioner contends that at Mr. 's death, half of the amount ($1,368.58) went to the Petitioner and was deposited in Regions Bank Account No. 6441478072 for her expenses in June 2012. However, banking records for both United Community Bank Account No. 2013104605 and Regions Bank Account No. 6441478072 do not support this assertion. (Exhibit R-10, R-13; See Petitioner's [Proposed] Stipulated Facts, filed June 10, 2013.)

at less than $10,000.00 and could be designated for burial expenses. (Testimony of Ms. Whitmire and Ms. Barnes; Medicaid Manual § 2323.)

11.

It appears from the record that Mr. owned a number of life insurance policies, which were paid upon his death. For the purpose of this decision, and in the absence of any evidence to the contrary, it is presumed that the proceeds of Mr. 's life insurance policies were appropriately designated for his burial expenses. Therefore, the Department did not consider his life insurance policies to be countable resources of the couple. (Exhibit R-24; Medicaid Manual § 2323.)

12.

Mr. owned two vehicles: a 2005 Chrysler Town and Country van, valued at $3,370.00; and a 1969 Ford Truck, valued at $40.00. For the purpose of determining the Petitioner's Medicaid eligibility prior to Mr. 's death, only one of the vehicles was considered a countable resource of the couple. (Testimony of Ms. Whitmire; Exhibit R-23; Medicaid Manual § 2308.)

13.

Given the ' extensive assets, the Department determined that the Petitioner was ineligible for Medicaid while Mr. was alive because the couple's combined resources exceeded the limit of $115,640.00 applicable to an institutionalized individual with a community spouse.[10] The Petitioner does not dispute this determination. (Stipulation of Parties; Testimony of Ms. Whitmire and Ms. Barnes.)

[10] Notably, the Department never conveyed this decision to the Petitioner in writing. Instead, the Department's position was expressed verbally to the Petitioner's attorney. (Testimony of Ms. Whitmire; Exhibit R-37.)

B. The Petitioner's Application After the Death of Her Spouse

14.

When Mr. died, all of the couple's assets, to the extent they were not already part of the Trust, were transferred to the Trust pursuant to Mr. 's will. Consequently, Ms. Braselton, as the trustee and sole beneficiary of the Trust, acquired exclusive control over all of the couple's assets immediately upon Mr. 's death. (Testimony of Ms. Barnes; Exhibits R-27, R-28.)

15.

After Mr. died and at the request of the Petitioner's attorney, the Department proceeded to assess the Petitioner's eligibility for Medicaid as a single individual. It is undisputed that because the Petitioner retained no countable resources, the value of her individual resources upon his death fell below the $2,000.00 Medicaid resource limit applicable to single individuals. Therefore, she was potentially eligible for Nursing Home Medicaid, provided that she met all other requirements. (Testimony of Ms. Whitmire; Exhibit R-37.)

16.

On April 9, 2013, following a lengthy delay, the Department issued a written determination regarding the Petitioner's Medicaid application. In part, the delay can be explained by the complexity of the Satterfields' asset management structure and the Petitioner's failure to provide accurate and timely information in response to the multiple requests for documents made by Carol Whitmire, the Medicaid eligibility specialist assigned to the Petitioner's case. However, a significant portion of the delay must be attributed to the

Department's inept and disorganized processing of the Petitioner's application.[11] (Testimony of Ms. Whitmire; Exhibit R-38.)

17.

The Department's determination letter stated that the Petitioner's application had been approved as of June 2012, but that a transfer of assets penalty would be imposed for the months of June 2012 through June 2016. The Petitioner does not dispute, and this Court will not disturb, the Department's determination that she is eligible for Nursing Home Medicaid. The Petitioner challenges only the imposition of the transfer penalty. (Exhibit R-38.)

18.

A Medicaid applicant who disposes of assets for less than fair market value is subject to a transfer of assets penalty. When a transfer penalty is imposed, an applicant is determined eligible for Medicaid, but vendor payments to a nursing home are withheld until the penalty period has expired. The Department calculates the duration of a transfer penalty by dividing the total uncompensated value of the transferred asset(s) by the average monthly private pay billing rate for nursing homes in the State of Georgia. The result is the number of months the transfer penalty will remain in effect. (Testimony of Ms. Barnes.)

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[11] The procedural history of this case is quite extensive. On August 23, 2012, the Petitioner filed her first request for an administrative hearing, based on the Department's failure to act on her application. A hearing was scheduled for October 9, 2012, but was continued at the Petitioner's request to November 14, 2012. Following discussions with the Department's representatives, she withdrew her hearing request and agreed to provide the Department with additional documentation. Thereafter, on December 13, 2012, the Department notified the Petitioner in writing that her application had been denied for the months of March 2012 through January 2013 because she had not provided all necessary documents. On December 20, 2012, the Petitioner filed a second hearing request, and a hearing was scheduled for February 6, 2013. At the parties' request, the hearing was continued to April 9, 2013. Prior to the hearing date, the case was removed from the calendar after both parties indicated that they believed that the issues could be decided on a written record. Both parties agreed that the Department's April 13, 2013, determination should be substituted as the basis for the Petitioner's appeal, and briefing was completed on May 3, 2013. However, because the parties failed to stipulate to any facts or to the contents of the written record, the Court was unable to decide the case in this manner. The hearing was rescheduled and ultimately held on June 17, 2013. See Court file.

19.

Ms. Braselton did not pay money or give other valuable consideration for any of the couple's assets that were transferred to her through Mr. 's will and the Trust. Therefore, the Petitioner is subject to a transfer penalty based on the uncompensated value of these assets, which was their combined fair market value at the time of Mr. 's death, as follows:

- $176,375.00, representing the value of the three real properties; plus
- $290,435.08, representing the value of the four annuities for which adequate documentation of value was provided to the Department (United American Deferred Annuity Policy No. 00-1640360, valued at $19,048.26; AIG (Western Life) Deferred Annuity Policy No. 4FK00010, valued at $118,535.23; Metropolitan Life Deferred Annuity Policy No. 8100623369, valued at $32,307.13; and Principal Life Deferred Annuity Policy No. 8695541, valued at $120,544.46); plus
- The values of the two annuities for which adequate documentation was not provided to the Department (AIG (Western Life) Deferred Annuity Policy No. 2FC2266209 and Genworth Single Premium Immediate Annuity Policy No. 3903286), all of which are unknown at this time; plus
- $16,425.66, representing the value of the four bank accounts; plus
- $3,410.00, representing the value of the two vehicles.[12]

The total uncompensated value of the Petitioner's assets, then, was $486,645.74[13] plus the values of the two annuities for which the Petitioner did not provide adequate documentation to the Department. However, the Department did not calculate the transfer penalty using this

[12] Because both vehicles were transferred to the Trust when Mr. died, the Petitioner was no longer entitled to an exemption for one of the vehicles. Medicaid Manual § 2308.

[13] $176,375.00 + $290,435.08 + $16,425.66 + $3,410.00 = $486,645.74.

methodology,[14] resulting in a significant underestimation of the length of the penalty period. (Testimony of Ms. Whitmire and Ms. Barnes; Exhibit R-38.)

20.

The Department calculated the duration of the transfer penalty by adding the fair market value of the three real properties ($176,375.00) to one-half of the value of a Medicaid-qualifying annuity that Mr. attempted to purchase before his death (50% of $137,583.49, or $68,791.45).[15] The sum of $245,166.45[16] was then divided by the average monthly private pay billing rate for nursing homes in the State of Georgia, which was $4,988.33 for calendar year 2012. Based on the result of this equation, the Department determined that the duration of the penalty period was 49.14 months,[17] or from June 2012 through June 2016. The Department's decision, which inexplicably failed to consider the total value of the transferred annuities or the couple's bank accounts and vehicles, significantly understated the length of the transfer penalty. Despite this error, which inured to the Petitioner's benefit, the Petitioner appealed the Department's determination. (Testimony of Ms. Whitmire and Ms. Barnes; Exhibit R-38.)

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[14] Due to the complexity of the Petitioner's application, Ms. Whitmire sought help from both her supervisors and the Department of Community Health's legal division. However, she received little assistance. Ultimately, she calculated the transfer penalty based on a directive given to her by Imogene Palmer, a former employee of the Department who served as the regional policy specialist. At the hearing, counsel for the Department reported that Ms. Palmer retired shortly before the hearing date and was unavailable to testify. (Testimony of Ms. Whitmire.)

[15] Prior to his death, Mr. attempted to purchase a Single Premium Immediate Annuity with Phoenix Life, with the State of Georgia listed as the beneficiary upon his death, using the proceeds of United American Deferred Annuities Policy No. 00-1640360 and Western Life Policy No. 4FK00010. However, because Mr. died prior to the issuance of the policy, the full amount of $137,583.49 was remitted to Mr. 's estate on July 3, 2012. By the terms of his will, the funds were placed in the Trust and ultimately transferred to Ms. Braselton, the trustee and sole beneficiary. The Department offered no legal basis for its decision to treat only half of the total amount as a disposition of assets for less than fair market value. (Testimony of Ms. Whitmire and Ms. Barnes; Exhibit R-19; *see also* Exhibit R-11 (amounts deposited in Regions Bank Account No. 0166498295 from April 10, 2012 to May 9, 2012),)

[16] $176,375.00 + $68,791.45 = $245,166.45.

[17] $245,166.45 ÷ $4,988.33 = 49.14.

III. CONCLUSIONS OF LAW

1.

Because this matter involves the proposed reduction or suspension of Medicaid benefits, the Department bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07(e). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

A. Medicaid Overview

2.

The Medicaid program is a cooperative venture between the federal and state governments through which medical care is offered to the needy. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502 (1990). Although participation in the program is voluntary, a state that chooses to participate must comply with the program requirements found in federal law. Id. at 502.

3.

To be eligible for Nursing Home Medicaid, an institutionalized individual must have net income below the state-established limit of $2,094.00, as well as less than $2,000.00 in countable resources. Medicaid Manual Appx. A1, Charts A1.1-.2. See also 42 U.S.C. §§ 1396a(a)(17), 1396r-5(b); Medicaid Manual § 2510. For an institutionalized individual with a community spouse, the resource limit is $115,640.00. Medicaid Manual Appx. A1, Chart A1.1.

4.

The Petitioner's income was not at issue in this proceeding. Therefore, the Court presumes that the Department correctly determined that the Petitioner is income-eligible for Nursing Home Medicaid as of June 2012.

B. The Petitioner's Resources and Medicaid Eligibility

5.

In determining the resource eligibility of an institutionalized individual who has applied for Medicaid assistance, the resources of the individual and the individual's spouse are considered jointly. 42 U.S.C. § 1396r-5(c). Any resource in which either spouse has an ownership interest is considered a resource to the couple. 42 U.S.C. § 1396r-5(c)(1)(A). Countable resources may include cash, real property, investments, savings and checking accounts, vehicles, and revocable trusts. Medicaid Manual §§ 2300, 2308, 2320, 2334, 2337. Resources such as the homeplace, household goods and effects, and property essential to self-support are generally excluded or considered non-countable. 42 U.S.C. §§ 1396r-5(c)(5), 1382b(a), (d); Medicaid Manual §§ 2316, 2319, 2327.

6.

In this case, it is undisputed that while Mr. was alive, the couple's combined resources exceeded the limit of $115,640.00 applicable to an institutionalized individual with a community spouse. Medicaid Manual § 2308. Therefore, the Department correctly determined that the Petitioner was not eligible for Medicaid assistance for the months of February 2012 through May 2012.

7.

During Mr. s lifetime, because the Trust was revocable, all of the assets that had been placed in the Trust were considered a resource to the couple. 42 U.S.C. § 1396p(d)(3)(A) ("In the case of a revocable trust[,] the corpus of the trust shall be considered resources available to the individual"). The couple's resources further included all assets that were titled in the name of either the Petitioner or Mr. Satterfield, with the exception of their life

insurance policies and one vehicle, which were excluded from consideration under Medicaid Manual §§ 2308 and 2323. Consequently, their total countable resources included the full value of the three parcels of real property,[18] the six annuities, the four bank accounts,[19] and the remaining vehicle. Medicaid Manual §§ 2308 (vehicles), 2316 (homeplace), 2329 (non-homeplace real property), 2334 (savings and checking accounts), 233 (trust property – OBRA '93), 2339 (annuities).

8.

The Petitioner argues that the Trust should not have been considered a resource to the Petitioner during Mr. l's lifetime, because it was funded by Mr. with assets that were not titled in the Petitioner's name. Contrary to the Petitioner's argument, however, it is immaterial whether the Trust was established by the Petitioner or Mr. , or whether it was funded with assets that were titled in Mr. s name, the Petitioner's name, or jointly.[20] In fact, Medicaid law permits unrestricted transfers to a spouse because a couple's assets, whether separately or jointly held, are considered to belong to each spouse in determining Medicaid eligibility. 42 U.S.C. § 1396p(c)(2)(B)(i); Medicaid Manual §§ 2300, 2304; Morris v. Oklahoma Dep't Human Servs., 685 F.3d 925, 936-37 (10th Cir. 2012); Centers for Medicare and Medicaid Services Manual ("CMS Manual") § 3258.11 (Exhibit R-5).

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[18] Even the ' homeplace, which would not have been considered a countable resource if the couple had retained title outside the Trust, became a countable resource when it was placed in the Trust. 42 U.S.C. § 1396p(d)(3); CMS Manual § 3259.6 (Exhibit R-5); Medicaid Manual § 2316; Michael A. Kirtland, Use and Misuse of Revocable Living Trusts in Alabama, 63 Ala. Law. 242, 248 (2002) (contents of a revocable living trust, including homeplace, are countable resources).

[19] Although two of the four bank accounts were jointly owned by Ms. Braselton, the Department's policy manual requires that they be treated as a resource to the couple in their entirety. Medicaid Manual § 2334.

[20] Furthermore, from the context (for example, the fact that the Petitioner transferred her property interests to Mr. on the same date that the Trust was established) it is obvious that, while the Petitioner was not a beneficiary of the trust, Mr. was acting in her stead in arranging for the preservation of their assets for their daughter. See Exhibits P-15, R-27. Thus, the Court finds unconvincing the Petitioner's argument that 42 U.S.C. § 1396p(d) transfer rules cannot apply here because Mr. was not acting in the Petitioner's "place" or on her behalf and did not use her assets in creating the trust.

9.

For Medicaid eligibility purposes, when an institutionalized individual's spouse establishes a trust, the "individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust." 42 U.S.C. § 1396p(d)(2). Further, the term "assets" is defined to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. § 1396p(h)(1); CMS Manual § 3257(B)(3) (Exhibit R-5). See also 42 U.S.C. § 1396r-5(c)(2) (at time of determining initial eligibility, "all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse"); 42 U.S.C. § 1396r-5(c)(1)(A)(a) ("the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest" must be considered in determining whether the institutionalized individual is eligible for Medicaid); Miller v. State Dep't of Soc. & Rehab. Servs., 64 P.3d 395, 405 , 363 (Kan. 2003) (citing Frolik and Brown, Advising the Elderly or Disabled Client § 14.05[2][a] (2d ed. 2002)) ("'The applicant is also treated as having established a trust if any of the following individuals, other than by will, established such a trust: the applicant's spouse . . .'"). Accordingly, prior to Mr. 's death, the corpus of the Trust was properly considered a resource to the Petitioner for the purpose of determining her Medicaid eligibility.

10.

At Mr. s death, however, the Trust became irrevocable, as its corpus passed out of his control. Bezzini v. Dep't of Soc. Servs., 715 A.2d 791, 795, 440 (Conn. App. Ct. 1998); see Michael A. Kirtland, Use and Misuse of Revocable Living Trusts in Alabama, 63 Ala. Law. 242, 243 (2002) (revocable living trusts become irrevocable upon the death of the grantor). As detailed in the Findings of Fact, above, the used the Trust as an instrument to

transfer all of their assets to Ms. Braselton, their daughter. When Mr. died, all of their assets were transferred into the Trust, and the entire corpus of the Trust was then conveyed to Ms. Braselton. Since the Petitioner retained no ownership interest in any of the Trust's assets, she became eligible for Medicaid upon Mr. 's death. Medicaid Manual Appx. A1, Charts A1.1; 42 U.S.C. §§ 1396a(a)(17).

C. Transfer of Assets Penalty

11.

This method of giving away the couple's assets, although it resulted in a determination that the Petitioner was eligible for Medicaid, also caused her to incur a transfer of assets penalty. 42 U.S.C. §§ 1396p(d)(3)(A)(iii), (d)(3)(B); Bezzini, 715 A.2d at 795.[21] An institutionalized individual who is found eligible for Nursing Home Medicaid is subject to a transfer of assets penalty if the "institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date," which begins five years prior to the date of application. 42 U.S.C. § 1396p(c)(1); Medicaid Manual § 2342. When a transfer penalty is imposed, Medicaid will not make vendor payments for an institutionalized individual's long-term care services, including nursing home care, for the duration of the penalty.

[21] The Petitioner's Second Brief for Administrative Review, filed July 1, 2013, attempts to distinguish the Bezzini case from the case at hand on four points. First, the Petitioner claims that in Bezzini the deceased spouse used both his own and his spouse's assets in forming the trust, while the Petitioner transferred her interest in the parcels of land prior to their placement into the RLT. The Bezzini decision, however, does not recite the purported facts as stated by the Petitioner. Bezzini, 715 A.2d at 795. Moreover, as explained above, this factual distinction would be immaterial, even if it existed, because a couple's resources are treated jointly under Medicaid law. As a second basis for distinguishing Bezzini, the Petitioner argues that the court's reasoning was based primarily on Connecticut state law, thereby rendering the case inapplicable in Georgia. However, the Bezzini court also relied on 42 U.S.C. § 1396p(c)(1) to find that transfers by one spouse are counted against the other for penalty purposes. Id. at 794.. The Petitioner's third argument is that Mr. Bezzini funded his revocable trust after his wife was already receiving long-term care, while the Trust in this case was established several years before the Petitioner entered the nursing home. This argument is not persuasive. See 42 U.S.C. § 1396p(d)(2)(C)(i) (purpose for which trust is established is irrelevant). Finally, Skindzier v. Commissioner of Social Services, 258 Conn. App. 642 (2001), which the Petitioner relies upon, is clearly distinguishable, as it involved a transfer of assets by will rather than by *inter vivos* trust. Id. at 660-61 (relying on 1993 amendment specifically exempting testamentary trusts from transfer penalty). As this case does not involve a testamentary transfer, Skindzier does not apply.

However, the individual will continue to be otherwise covered by Medicaid. 42 U.S.C. § 1396p(c)(1)(A), (c)(1)(C)(i); Medicaid Manual § 2342.

12.

The Petitioner incurred a transfer penalty as of the date of Mr. s death, May 11, 2012, because that was the point at which she and/or her spouse lost control of their assets, including those in the Trust. 42 U.S.C. § 1396p(d)(3)(B) (contents of irrevocable trust over which the institutionalized individual lacks control are considered transferred assets subject to penalty). CMS Manual §§ 3257, 3259.6 (Exhibit R-5); Medicaid Manual § 2337. To conclude otherwise, and allow the to give away their assets to their daughter without incurring a penalty, would thwart the purpose of the Medicaid program to provide for those who truly require financial assistance.[22] See Bezzini, 715 A.2d at 795-96.

13.

In this case, the Department was required to assess a transfer penalty based on the value of all of the couple's assets that were transferred to Ms. Braselton through Mr. s will and the Trust.[23] As detailed in the Findings of Fact, above, the value of these assets was $486,645.74 plus the value of AIG (Western Life) Deferred Annuity Policy No. 2FC2266209 and Genworth Single Premium Immediate Annuity Policy No. 3903286, the two annuities for which adequate documentation of value was not provided to the Department.

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[22] When Congress enacted the transfer of assets penalty provisions, it intended "to eliminate formalistic devices which shelter assets for the potential benefits of heirs and which divert scarce federal and state resources from low-income elderly and disabled individuals, and poor women and children." Miller v. State Dep't of Soc. & Rehab. Servs., 64 P.3d 395, 404- (Kan. 2003).

[23] The Court notes that if Mr. had been successful in his attempt to purchase a Medicaid-qualifying annuity, wherein the annuity is established for the benefit of the community spouse and the State is named as the remainder beneficiary for "at least the total amount of medical assistance paid on behalf of the institutionalized individual," the value of the annuity would have been exempt from the transfer penalty. 42 U.S.C. § 1396p(c)(1)(F); Cook v. Bottesch, 320 Ga. App. 796 (2013); Medicaid Manual § 2339. However, Mr. s attempt to purchase such an annuity was unsuccessful.

14.

Under the Deficit Reduction Act of 2005, the Department is not authorized to impose a transfer of assets penalty if "the assets were transferred exclusively for a purpose other than to qualify for medical assistance." 42 U.S.C. § 1396p(c)(2)(C). Similarly, the Department's policy manual provides that no transfer of assets penalty will apply where "[a]n asset was transferred **exclusively** for a purpose other than to qualify for Medicaid." Medicaid Manual, § 2342-2 (emphasis in original); see also CMS Manual § 3258.10(C) (Exhibit R-5).

15.

The law presumes that when an asset is given away or sold for less than fair market value, the transfer was made for the purpose of establishing Medicaid eligibility. To overcome this presumption, the Petitioner must make a "satisfactory showing" that

> (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual.

42 U.S.C. § 1396p(c); see Johnson v. Llewellyn, 194 Ga. App. 186 (1990); Johnson v. Ellis, 174 Ga. App. 861 (1985). The Petitioner did not make a satisfactory showing to overcome this presumption.

16.

In this case, the Petitioner presented no evidence to rebut the presumption that she and/or Mr. gave away their assets for the purpose of establishing the Petitioner's Medicaid eligibility. In fact, the evidence revealed that the , in an effort to obtain Medicaid coverage for the Petitioner's long-term care, attempted to exploit perceived Medicaid loopholes and to shelter extensive assets that could otherwise have paid for her care. None of the

transferred assets have been returned to the Petitioner. Under these circumstances, the Department's imposition of a transfer of assets penalty was proper.

17.

The Department's calculation of the transfer penalty, however, was in defiance of logic, the federal laws and regulations governing Medicaid eligibility, and the Department's own policy manual.

18.

To calculate a transfer penalty, the Department is first required to determine the uncompensated value of the property transferred, which is "the difference between the [fair market value] of the asset at the time of the transfer and compensation received for the resource." Medicaid Manual § 2342-2; see also 42 U.S.C. § 1396p(c)(1)(E); CMS Manual § 2258.1 (Exhibit R-5); Medicaid Manual Appx. E-16. The Department then divides the total uncompensated value by the "average cost to a private patient of nursing facility costs in the State," or $4,988.33 for calendar year 2012.[24] 42 U.S.C. § 1396p(c)(1)(E); Medicaid Manual Appx. A1, Chart A1.3. The result of this equation equals the number of months the individual will be ineligible for Medicaid assistance. Id. The penalty begins on the first day of either the month in which the transfer occurred or the month in which the institutionalized individual would otherwise be eligible for Medicaid, whichever is later. 42 U.S.C. § 1396p(c)(1)(D)(ii); Medicaid Manual § 2342. There is no limit on the number of months for which a penalty may be incurred. Id.

[24] The nursing home private pay billing rate set forth in the Medicaid Manual is a statewide average, as authorized by 42 U.S.C. § 1396p(c)(1)(E)(i)(II). Medicaid Manual Appx. A1, Chart A1.3.

19.

Here, as discussed above, the uncompensated value of the transferred assets was $486,645.74 plus the value of AIG (Western Life) Deferred Annuity Policy No. 2FC2266209 and Genworth Single Premium Immediate Annuity Policy No. 3903286. The transfer occurred on May 11, 2012, the date of Mr. s death, and the Petitioner was determined eligible for Medicaid as of June 2012. Therefore, the penalty period begins on the first day of June 2012. 42 U.S.C. § 1396p(c)(1)(D)(ii); Medicaid Manual § 2342. This Court is unable to calculate the precise duration of the penalty, due to the absence of sufficient documentation of the value of the two annuities. However, it is clear that the penalty period is significantly longer than the 49.14 months calculated by the Department.[25]

20.

The Petitioner proposes that as an alternative to the imposition of a transfer penalty, Ms. Braselton should be allowed to establish a special needs trust for the benefit of the Petitioner with a portion of the assets she received through the Trust. See Petitioner's Second Brief for Administrative Review, filed July 1, 2013. However, a special needs trust would not negate the transfer penalty because the Petitioner is not a disabled individual under the age of sixty-five. 42 U.S.C. § 1396p(d)(4)(A); Medicaid Manual § 2346.

[25] This decision is "de novo in nature, and the evidence on the issues in a hearing shall not be limited to the evidence presented to or considered by the Referring Agency prior to its decision." See also Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc., 298 Ga. App. 753, 768 (2009) (administrative law judge may not defer to the agency's decision). Furthermore, the administrative law judge steps into the shoes of the referring agency and "may make any disposition of the case that could have been made by the Referring Agency." Ga. Comp. R. & Regs. 616-1-2.21(1). Here, there were clear errors in the Department's methodology that require the imposition of a longer penalty period.

D. Standard of Promptness

21.

The Department's policy manual contains a Standard of Promptness, which provides that Medicaid applications submitted by aged or blind applicants should be determined within 45 days. Medicaid Manual § 2060-5. This requirement is also found in federal regulations, which provide as follows with regard to timely application processing:

> (a) The agency must establish time standards for determining eligibility and inform the applicant of what they are. These standards may not exceed—
>
> (1) Ninety days for applicants who apply for Medicaid on the basis of disability; and
>
> (2) Forty-five days for all other applicants.
>
> (b) The time standards must cover the period from the date of application to the date the agency mails notice of its decision to the applicant.
>
> (c) The agency must determine eligibility within the standards except in unusual circumstances, for example—
>
> (1) When the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action, or
>
> (2) When there is an administrative or other emergency beyond the agency's control.
>
> (d) The agency must document the reasons for delay in the applicant's case record.
>
> (e) The agency must not use the time standards—
>
> (1) As a waiting period before determining eligibility; or
>
> (2) As a reason for denying eligibility (because it has not determined eligibility within the time standards).

42 C.F.R. § 435.911; see 42 U.S.C. § 1396a(a)(8).

In this case, the Department failed to make a decision regarding the Petitioner's application within the required time frame. However, despite the Department's inexcusable delays in processing the Petitioner's application, the Court lacks the authority to devise a remedy for this violation, especially where, as here, the Petitioner was not prejudiced by the Department's failure to act in a timely manner. See Sanchez v. Walker Cnty. Dep't of Family and Children Servs., 237 Ga. 406, 410 (1976).

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to impose a transfer of assets penalty against the Petitioner is hereby **AFFIRMED**. However, the case is **REMANDED** for a recalculation of the penalty period in accordance with this decision. Further, within thirty days of the entry of this decision, the Petitioner is **ORDERED** to provide the Department with documentation sufficient to determine the value of AIG (Western Life) Deferred Annuity Policy No. 2FC2266209 and Genworth Single Premium Immediate Annuity Policy No. 3903286. The Department shall issue its revised determination of the transfer penalty within thirty days of the date it receives the necessary documentation from the Petitioner.

SO ORDERED, this 29th **day of July, 2013.**

KRISTIN L. MILLER
Administrative Law Judge