DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: July 31 2018 10:43 PM CASE NUMBER 3
Plaintiff/Appellant. And Defendant/Appellee, **STATE DEPT. OF HEALTH CARE POLICY AND FIN.** ***et. al.***	↑ Court Use Only ↑ Case Number: Ctrm: 275

ORDER ON JUDICIAL REVIEW

THIS MATTER comes before the Court on Plaintiff's request for judicial review pursuant to C.R.S. § 24-4-106 of the Administrative Procedures Act. Plaintiff filed her opening brief January 21, 2016, Defendant filed its response February 25, 2016, and Plaintiff filed a reply brief March 17, 2016. The Court, having reviewed Plaintiff's Opening Brief ("Op. Br."), Defendant's Answer Brief ("Def. Ans"), the Reply Brief, the agency record, relevant legal authority, the court file, and being otherwise fully advised in the premises, HEREBY FINDS and ORDERS as follows:

FACTUAL BACKGROUND

This is an appeal of a Final Agency Decision whereby the Colorado State Department of Health Care Policy and Financing ("Department") imposed a penalty period upon Plaintiff 's receipt of Medicaid long-term care ("LTC") benefits.

Plaintiff is a disabled individual as defined in 42 U.S.C. § 1382c(a)(3). During treatment for [redacted] in 2005, Plaintiff's physician accidentally administered an overdose of morphine to her, resulting in her disabilities. Pl.'s Comp. at ¶ 29. As a result of the overdose, she suffered anoxic encephalopathy, a brain injury, and was in a coma for a week. *Id.* This resulted in permanent physical disability and partial mental disability. *Id.* at ¶ 30. Plaintiff regained the ability to speak after a year, and has since regained partial use of her arms. *Id.* However, she cannot live independently and relies on nursing home care. *Id.* at ¶ 34.

In [redacted] 2013, after Plaintiff turned 65, her former conservator executed a trust agreement with the Colorado Fund for People with Disabilities ("CFPD"), a Colorado

non-profit corporation recognized by the Internal Revenue Service as a tax-exempt public charity within the meaning of Section 501(c)(3) of the Internal Revenue Code. CFPD serves as a trustee under the Fourth Amended Declaration of Trust of the Colorado Fund for People with Disabilities, Inc. ("Trust"), a pooled trust within the meaning of 42 U.S.C. § 1396p(d)(4)(C). A pooled trust is a trust established and administered by a nonprofit organization. Each beneficiary has a separate sub-account, but the trust pools the accounts for investment and management purposes. *Id.* Plaintiff's conservator executed the Transfer Agreement for Beneficiaries Over the Age of 65 ("Transfer Agreement"). The conservator then issued two checks to the trust – for $15,000 and $14,384.57. At the time of the execution, Plaintiff was 65 years old.

CFPD sent a caseworker to meet with Plaintiff and her Guardian to discuss Plaintiff's needs and desires. CFPD then funded Plaintiff's trust sub-account with the funds and prepared an Assessment and Plan dated July 18, 2013 ("Spending Plan") tailored to Plaintiff's needs. The Spending Plan requires CFPD to provide ongoing case management for Plaintiff, and to manage the funds of the account, including bookkeeping. The Spending Plan sets forth "One Time Expenditures" totaling $4,350, including a deposit fee of $300, a set-up fee of $250, an Assessment and Plan fee of $200, furniture of $800, conservatorship fees of $2000, and attorney fees of $800. OACR, at 74.[1] The Spending plan also lists estimated yearly "Ongoing Expenditures" in the amount of $3,000, including a $40 monthly case management fee totaling $480/year, a $10 monthly bookkeeping fee totaling $120/year, dental care at $300/year, wheelchair maintenance or replacement at $500/year, accessible van lift maintenance and repairs at $1,000/year, and a $50 monthly charge for alternative therapy totaling $600/year. *Id.* At the time the Spending Plan was drafted, Plaintiff's life expectancy was 20.19 years. *Id.*

On May 28, 2013, after having lived at the [redacted] nursing home since late 2005, Plaintiff applied for Medicaid long-term care ("LTC") benefits through the Arapahoe County Department of Human Services ("ACDHS"). In connection with the application, ACDHS sent the pooled trust documents to the Department for review and approval. The original Transfer Agreement was unsigned, so the Department's Trust Officer initially declined to approve the trust. On January 27, 2014, ACDHS re-submitted the request for Department review after receiving fully executed documents from Plaintiff. The following documents were provided to the Department: CFPD's Transfer Agreement and corresponding paperwork; paperwork designating CFPD as Plaintiff's representative payee for social security benefits; the "Declaration of Income Trust"; copies of the two checks made to fund the trust with CFPD; CFPD's Spending Plan, listing estimated expected trust expenditures to be made by the trust; and a letter from Plaintiff's conservator's attorney stating that the Spending Plan was being submitted in order to rebut the presumption of a transfer without fair consideration set forth in Colorado Medicaid regulations.

[1] References to the record certified by the Office of Administrative Courts will be referred to as "OACR" throughout this Order. References to page numbers will be to the Bates number(s) assigned to the particular page(s), which are four numerals less than the pagination listed on the record CD, due to the four-page Certificate of Record prepared by the OAC which precedes the actual Bates numbered record.

The Department, through its Trust Officer, determined that Plaintiff failed to rebut the presumption, stating as follows in her letter of February 14, 2014:

> , was 65 years old at the time of the transfer. If an individual for whom a pooled trust is established is 65 years of age or older, the transfer of assets into the pooled trust creates a rebuttable presumption that the assets were transferred without fair consideration. *See* 10 C.C.R. 2505-10, Section 8.100.7.E.6.c.ii. The elements required to rebut the presumption that a transfer was without fair consideration are listed at 10 C.C.R. 2505-10, Section 8.100.7.G.6 and 7. The documentation submitted in this regard does not rebut the presumption that the funds were transferred to establish or maintain Medicaid eligibility. **Therefore, a penalty period of ineligibility as set forth in the Department regulations would be applicable to Ms. 's transfer of funds into the CFP the pooled trust.**

, at 82 (emphasis original). After receiving s letter, the ACDHS imposed a 4.18-month penalty period of ineligibility. This period was calculated by dividing the amount of the transfer, $29,384.57, by the average monthly cost of institutional care for the region, $7,023. OACR, at 40.

On July 10, 2014, Plaintiff appealed this decision in the Office of Administrative Courts. She argued that she did receive fair consideration for the transfer because the CFPD pooled trust ensured that "her needs, above and beyond what Medicaid will provide, will be met, funds will be used solely for [her] benefit, and [her] quality of life will be enhanced as a result." OACR, at 208. She also argued that CFPD's fiduciary duties to her obligate it to use the Funds for her benefit during her lifetime in the manner outlined in the Spending Plan. *Id.* Although s letter of February 14, 2014 had not so asserted, the Department maintained that the transfers were without fair consideration because the agreement only served "to deprive [Plaintiff] of control of her asset in exchange for an imposed duty to her to now pay various initial and continuing trust administration fees and a vague promise that at some point in the future she may – but is not guaranteed – to receive items and services listed on her spending plan." *Id.*, at 98-99. The Department also argued that the Spending Plan was not contractual in nature, only listed estimated expenditures for the trust, and could be changed or modified at any time by CFPD. *Id.*

The case was assigned to Administrative Law Judge ("ALJ Light"), who held a telephone hearing on January 13, 2015 at which she heard testimony from on behalf of the Department; on behalf of ACDHS; , Plaintiff's longtime companion and Guardian; , Plaintiff's case manager with CFPD; and , Executive Director of CFPD. In her Initial

Decision issued February 10, 2015 ("Initial Decision"), ALJ Light first rejected the Department's argument, based upon a federal regulation which shefound did not apply, [2] that Plaintiff had not received anything of value from CFPD at the time of transfer. She considered the Department's regulatory definitions of "fair market value," "fair consideration," and "valuable consideration," and concluded that "there is no legal requirement that Appellant receive all consideration for her $29,384.57 at the time of transfer. Rather, ...State Department rules merely define fair consideration as requiring an amount equal to or greater than the value of the transferred asset." Initial Decision, ¶ 16, at 6; OACR at 221.- The ALJ made findings of fact and reached conclusions of law, which warrant lengthy citation:

> 17. Appellant received value from CFPD is [sic] an amount at least equal to the value of her transferred asset. The Plan established that Appellant will receive approximately $3,000.00 per year in services from CFPD, and credible evidence was presented that to date CFPD has spent funds in accordance with the Plan by providing repairs to Appellant's wheelchair, paying for her dental care, health insurance, and beautician services. Moreover, the fact that Appellant's trust will be entirely spent down well within her actuarial lifetime, and that the Transfer Agreement, as well as CFPD's legal fiduciary duties, require that the trust assets be spent on her behalf, further provide credible evidence that Appellant received full and fair consideration in exchange for her transfer of $29,384.57.
>
> 18. Moreover, the objective and credible evidence established that Appellant intended to dispose of her assets for fair consideration. credibly testified that the CFPD trust was set up to do things he "could not possibly do" to care for Appellant's many needs related to her disability. He wanted and needed all of the services CFPD would provide. Those services were the consideration for the transfer, and Appellant and wanted, needed, and intended to receive the full value of CFPD services in exchange for the transfer; in other words, fair consideration.
>
> 19. The ALJ concludes Appellant intended to dispose of her assets for fair consideration, and in fact received fair consideration in the form of CFPD's services to her that are at least equal in value to her $29,384.57 transfer. The credible and persuasive evidence in the record does not support the Department's position that this was a transfer without fair consideration warranting a period of ineligibility.

Initial Decision, at 6-7; OACR, at 221-222.

The Department appealed to its Office of Appeals, which reversed the ALJ's Initial Decision in its Final Agency Decision issued on May 29, 2015 ("Final Agency

[2] 20 C.F.R. §416.1246(b).

Decision"). The Department held that the ALJ's conclusion was not supported by the regulations. Relying on the same regulatory definitions has had the ALJ, the Department concluded that "[a]ll three of these definitions refer to the present value of assets transferred; there is no qualifying language such as 'the value to be *received*' or other references to receipt of future benefits." Final Agency Decision, at 3; OACR at 274 (emphasis original). The Department concluded that the Spending Plan did not constitute "valuable consideration" equal to Plaintiff's transfer to the CFPD trust because there was no guarantee that all of the purchases would be executed at the estimated amounts, the terms of the trust indicate that CFPD could change the terms of the spending plan in its sole discretion, and there was no guarantee that Plaintiff "will receive full value for her transfer if she dies before completion of the contracted terms." *Id.*, at 3-4; OACR at 274 - 275. The Department concluded that

> the applicable valuation date is when the assets are transferred by the Appellant, not when the Appellant receives the final dollar's benefit from the transfer. The evidence does not support that the Appellant received the full benefit of her transfer at the time of transfer to the pooled trust. The Appellant did not overcome the presumption that this was a transfer without fair consideration, and therefore an ineligibility period is appropriate.

Id., at 4; OACR, at 275.

On July 9, 2015, Plaintiff initiated this action for judicial review and a stay of agency action pursuant to C.R.S. § 24-4-106, and a claim that the Final Agency Decision is a denial of her rights under federal law and the U.S. Constitution. On September 24 2015, the Department filed a Partial Motion to Dismiss Plaintiff's Fourth Claim for Relief for lack of subject matter jurisdiction pursuant to CRCP 12(b)(1), and Plaintiff's Fifth Claim for Relief, pursuant to CRCP 12(b)(5) for failure to state a claim upon which relief can be granted. On September 21 2016, the court granted the Department's Partial Motion to Dismiss Plaintiff's Fourth Claim for Relief because she failed to meet her burden under Rule 12(b)(1) to prove the court's subject matter jurisdiction, and granted in part and denied in part the Department's Motion to Dismiss Plaintiff's Fifth Claim for Relief (granted with respect to the equal protection and due process claims and claim pertaining to 42 U.S.C. § 1396p(d)(4)(C), and denied with respect to claims pertaining to 42 U.S.C. § 1396a(a)(18), 1396p(c)(4), and 1396p(c)(2)(C)). Following that ruling, the court ordered the bifurcation of the APA claim from those under 42 U.S.C. § 1983, in an Order dated September 26, 2016.

Plaintiff requests that this Court set aside the Final Agency Decision and reverse the Department's imposition of the four month and six day penalty period, award Plaintiff

attorney's fees, costs, and interest, and grant such other relief as the court deems proper. The Department requests that the Court affirm the Final Agency Decision.[3]

STANDARD OF REVIEW

The Administrative Procedures Act sets forth the standard for judicial review of agency actions. As relevant here, C.R.S. § 24-4-106(7) states that if the court finds that the "agency action is arbitrary and capricious, a denial of statutory right, . . . not in accord with the procedures or procedural limitations of this article or as otherwise required by law,... [or] unsupported by substantial evidence when the record is considered as a whole... the court shall hold unlawful and set aside the agency action." In determining whether an administrative agency's decision is arbitrary and capricious, courts must "determine whether a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. If not, no abuse of discretion has occurred and the agency decision must be upheld." *Ramseyer v. Colo. Dept. of Soc. Servs.*, 895 P.2d 1188, 1192 (Colo. App. 1995). If an agency's decision is supported by "substantial evidence in the record," it must be upheld. *State Board of Med. Examiners v. McCroskey*, 880 P.2d 1188, 1196 (Colo. 1994).

"The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the administrative law judge ... shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence." C.R.S. §24-4-105(15)(b). "Evidentiary facts are the historical facts underlying the controversy," while ultimate conclusions are "conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties." *Samaritan Institute v. Prince-Walker,* 883 P.2d 3, 9 (Colo. 1994) (citing *Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990)); *Nixon v. City and County of Denver,* 343 P.3d 1051, 1056 (Colo. App. 2014). Ultimate facts "as a general rule [are] framed in the language of the controlling statute or legal standard." *Federico*, 788 P.2d at 1272. Evidentiary facts, by contrast, involve "a purely factual question to be determined from the evidence without reference to a legal standard." *Samaritan Institute*, 883 P.2d at 9.

Hearing officers generally have the power to make findings regarding the credibility of witnesses, which are binding on appeal. *Varsity Contractors & Home Ins. Co. v. Baca*, 709 P.2d 55, 57 (Colo.App. 1985) ("[r]esolution of the credibility of witnesses by the hearing officer is a question of evidentiary fact which is binding on review.") *Nixon,supra,* 343 P.3d at 1057 (Colo. App. 2014)("... the Commission was required to defer to the Panel's findings of historical fact, including the finding that Nixon was credible, ...").

[3] The ACDHS is also named as a Defendant, and joins the Department's Answer Brief. *See* County Def. Join. State Def.'s Ans. Brief.

ANALYSIS

A. Medicaid, Long Term Care, and Countable Resources

Medicaid is a cooperative federal/state program created by Title XIX of the Social Security Act. 42 U.S.C. § 1396. It is meant to assist people whose income and resources are not enough to meet the financial demands of necessary care and services. *Stell v. Boulder County Dept. of Soc. Serv.*, 92 P.3d 910, 912 (Colo. 2004). Federal and state law recognize that Medicaid is to be the payer of last resort. 42 U.S.C. § 1396k; C.R.S. § 25.5-4-300.4.

For those who qualify for LTC benefits, Medicaid pays for them to live in institutions, such as nursing homes. *Frantz v. Lake*, 2014 U.S. Dist. LEXIS 116916, 12-13 (W.D. Okla. 2014). To qualify for LTC, an individual must be financially eligible and disabled within the meaning of 42 U.S.C. §1382c(a)(3); 10 C.C.R. 2505-10, §8.100.3.G(1)(d)-(e).[4] Financial eligibility is based on countable income and resources. § 8.100.5.E. Qualifying individuals must have "countable resources of $2,000 or less and must not have disposed of any assets for less than fair market value during the last five (5) years." *Frantz*, 2014 U.S. Dist. LEXIS 116916 at 12-13 (citing 42 USC §§ 1396p(c)(1)(A)).

Trusts are generally considered countable resources for purposes of Medicaid eligibility. 42 U.S.C. 1396p(d). However, in the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 ("OBRA '93"), Congress exempted three types of trusts, known as special needs (or disability) trusts, income trusts, and pooled trusts, from those which must be counted as resources available to an applicant for purposes of Medicaid eligibility. 42 U.S.C. § 1396p(d)(4)(A)-(C). Colorado adopted these three types of trusts created under federal law in C.R.S. §§ 15-14-412.7 - 412.9; § 8.100.7.E.6.

Under both federal and state law, a pooled trust must be established and managed by a nonprofit association; separate sub-accounts must be maintained for each beneficiary of the trust, which are pooled for purposes of investment and management; and the sub-accounts must be established solely for the benefit of individuals who are disabled by a parent, grandparent, or legal guardian, or by the individual herself, or by a court. 42 U.S.C. §1396p(d)(4)(C); C.R.S. §15-14-412.9. Pooled trusts are intended for individuals with small sums of money who can reduce overhead and expenses associated with the trust by pooling their assets. *Lewis v. Alexander*, 685 F.3d 325, 333 (3d. Cir. 2012). Under both federal and state law, and unlike special needs trusts and income trusts, pooled trusts are not required to repay the state for medical assistance received by the beneficiary from any amounts remaining in a sub-account upon the beneficiary's death except to the extent of any amounts that are not retained by the trust. 42 U.S.C. § 1396p(d)(4)(C)(iii); C.R.S. § 15-14-412.9(2)(e).

---

[4] Department rules pertaining to Medicaid appear at 10 C.C.R. 2505-10, §8.100 et seq. Hereafter, citations in this Order will be only to the section numbers, excluding the antecedent cite to the Code of Colorado Regulations.

B. Transfer Rules

Here, it is undisputed that Plaintiff is disabled for purposes of 42 U.S.C. § 1382c(a)(3); that the CFPD trust is a valid pooled trust under both federal and state law; that Plaintiff is the sole lifetime beneficiary of the subaccount of the CFPD Trust created by her conservator; and that Plaintiff was not precluded by federal or state law from transferring assets into the CFPD pooled trust even though she was over the age of 65. The only issue in this case is whether her transfer of the $29,384.37 into the pooled trust properly gives rise to an eligibility penalty under the transfer rules, as the Department contends. It is settled law that the transfer rules apply independently of the eligibility rules. *See, e.g., In Re: Pooled Advocate Trust,* 813 N.W. 2d 130, 142 (S.D. 2012).

OBRA '93 provided that, in order to satisfy the requirements of the federal Medicaid statute, "the State plan must provide that if an institutionalized individual... disposes of assets for less than fair market value on or after" 60 months prior to applying for Medicaid, that individual will be ineligible for medical assistance for the number of months arrived at by dividing the value of the assets transferred by the average monthly cost to a private patient of nursing facility services in the state. Pub. L. 103-66, § 13611(a)(1); 42 U.S.C. §§ 1396p(c)(1)(A), (c)(1)(B)(i), (c)(1)(E)(i)(I) and (II). In that same legislation, Congress also enacted or amended two exemptions from this rule. The first was for "assets [which] were transferred to a trust (including a [pooled] trust) established solely for the benefit of an individual under 65 years of age who is disabled." Pub. L. 103-66, §13611(a)(2); 42 U.S.C. § 1396p(c)(2)(B)(iv)(hereinafter, the "under 65 exemption") Second, Congress also provided that an individual shall not be ineligible for medical assistance to the extent that "a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration..." 42 U.S.C. § 1396p(c)(2)(C)(hereinafter, the "fair market value exemption").

In Colorado, the Department chose to deal with the under 65 exemption in the federal Medicaid statute by promulgating a regulation which allows the matter to be litigated, as follows:

> If an institutionalized individual for whom a pooled trust is established is 65 years of age or older, the transfer of assets into the pooled trust creates a rebuttable presumption that the assets were transferred without fair consideration and shall be analyzed in accordance with the rules on transfers without fair consideration in this volume.

§ 8.100.7.E.6.c.ii). With respect to the fair market value exemption in the federal Medicaid statute, the Department provided that "[n]o period of ineligibility shall be assessed in any of the following circumstances: a. Convincing and objective evidence is provided that the individual intended to dispose of the resources either at fair market value or for other fair consideration." §8.100.7.G.12.

The rules on transfers are set forth in §8.100.7.F, including the three definitions of "Fair market value," "Fair consideration," and "Valuable consideration" upon which the ALJ and the Department each relied in their Initial Decision and Final Agency Action, respectively. "Fair consideration" is defined as "the amount the individual receives in exchange for the asset that is transferred, which is equal to or greater than the value of the transferred asset." § 8.100.7.F.1.c. "Fair market value" is defined as "the value of the asset if sold at the prevailing price at the time it was transferred." § 8.100.7.F.1.b. "Valuable consideration" is defined as "what an individual receives in exchange for his or her right or interest in an asset which has a tangible or intrinsic value to the individual that is equivalent to or greater than the value of the transferred asset." § 8.100.7.F.1.g.

C. The Final Agency Action is Unsupported by Substantial Evidence when the Record is Considered as a Whole.

Based on the evidence she heard at the hearing, ALJ Light concluded that Plaintiff had rebutted the presumption that Plaintiffs transfer of assets into the CFPD pooled trust was without fair consideration. In reaching that conclusion, the ALJ examined the Spending Plan, noting that it established that Plaintiff would receive approximately $3,000 per year in services, and that "credible evidence was presented that to date CFPD has spent funds in accordance with the Plan by providing repairs to [Plaintiff's] wheelchair, paying for her dental care, health insurance, and beautician services." Initial Decision, at 7; OACR, at 222. She also found that the fact that the trust would be spent down well within Plaintiff's actuarial lifetime, and the fact that the Transfer Agreement, as well as CFPD's fiduciary duties require that the trust assets be spent on Plaintiff's behalf provided further credible evidence that she had received full and fair consideration for the transferred funds. *Id.* She also found that the evidence established that Plaintiff intended to dispose of the assets for fair consideration, based upon the testimony of her friend and guardian, l , who testified that the trust had been set up to do things he "could not possibly do" to care for Plaintiffs disability-related needs. She concluded as follows:

> Those services were the consideration for the transfer, and [Plaintiff] and ı wanted, needed, and intended to receive, the full value of CFPD services in exchange for the transfer; in other words, fair consideration.

Thus, ALJ Light concluded, on the basis of convincing and objective evidence, that Plaintiff intended to dispose of the assets for fair consideration. § 8.100.7.G.12.

While the difference between "evidentiary facts" and "ultimate conclusions of fact" is not always clear, *Lawley v. Dept. of Higher Educ.*, 36 P.3d 1239, 1245 (Colo. 2001), that distinction is not particularly illusive in this case. The regulatory definition of "fair consideration" is a fact-intensive one, requiring an analysis of the value which a trust beneficiary received in exchange for transferring her assets. Indeed, the scope of the hearing before ALJ Light was for the sole purpose of determining whether Plaintiff could rebut the

presumption of no fair consideration which the regulation creates when an institutionalized Medicaid beneficiary over the age of 65 transfers assets into a pooled trust. § 8.100.7.E.6.c.ii). By definition, a rebuttable presumption contemplates an opportunity to offer factual evidence to rebut a factual conclusion that otherwise would stand.

y, *McCormick's Handbook of the Law of Evidence,* at 804 (2d ed., 1972)("a rebuttable presumption [is when] the party against whom the presumption operates can always introduce proof in contradiction.") As our supreme court has held, a rebuttable presumption has a limited purpose:

> A rebuttable presumption (1) shifts the burden of going forward to the party against whom it is raised, and (2) if that burden is not met, establishes the presumed facts as a matter of law. However, if the burden is met, the presumption does not continue in the case. Nonetheless, a permissible inference of the presumed fact remains.

Krueger v. Ary, 205 P.3d 1150, 1154 (Colo. 2009).

Here, not only was the evidence summarized by ALJ Light sufficient to rebut the presumption that Plaintiff had deposited her assets into the CFPD trust without fair consideration, there was virtually no evidence offered in opposition to it. At the hearing, Defendant called only he trust officer of HCPF. testified, in entirely conclusory terms, that the documents that had been submitted to her on Plaintiff's behalf did not rebut the presumption because they "did not provide a value equal to or greater than the amount that's been transferred in as a final transfer." Tr. at 36. She recited no factual reasons for that conclusion. Just as she had failed to do in her letter of February 14, 2014, at the hearing r provided no specific factual analysis as to why the Spending Plan did not amount to fair consideration. She acknowledged that she has reached the same conclusion with respect to each case involving a transfer to a pooled trust by a disabled person over the age of 65 which she has examined. Tr. at 41.

The court concludes that the ALJ's finding that the presumption of no fair consideration had been rebutted, and ultimately that Plaintiff's transfer into the CFPD trust was for fair consideration, were findings of evidentiary fact, and therefore may not be set aside unless they are contrary to the weight of evidence. C.R.S. § 24-4-105(15)(b). Not only is ALJ Light's finding that the transfer was made for fair consideration not contrary to the weight of the evidence, there is virtually no evidence contradicting it. *Cf., In Re: Pooled Advocate Trust,* 813 N.W.2d 130, 147 (S.D. 2012)(Medicaid beneficiaries identified no items or services purchased for them by the trust). Thus, even if the Department's contrary conclusion in the Final Agency Decision is characterized as a conclusion of ultimate fact, it is not supported by any evidence in the record, let alone substantial evidence. Therefore, it cannot stand.

D. The Department's interpretation of "fair consideration" as requiring a present, full, and immediate exchange of value is arbitrary and capricious.

1. The regulation's use of the present tense is not dispositive.

In its Final Agency Decision, the Department interpreted the regulatory definition of fair consideration as requiring a full and immediate exchange of value at the time of the transfer, a present consideration and not a promise for a future benefit. Final Agency Decision, at 4; OACR, at 274-275. The Department interpreted the present-tense phraseology of the regulation's definition of "fair consideration," as well as that of "Fair market value" and "Valuable consideration," to require a full and immediate exchange of value to rebut the presumption against fair consideration. *Id.*, at 3. Specifically, the Department found dispositive the regulation's use of the words "receives" and "is" in the definition of fair consideration: ". . . amount the individual *receives* in exchange for the asset that is transferred, which *is* equal to or greater than the value of the transferred asset." *Id., quoting* § 8.100.7.F.1.c [Department's emphasis].

An agency's interpretation of the law is subject to *de novo* review. *Woods v. City & County of Denver,* 122 P.3d 1050, 1053 (Colo. App. 205)(*citing United Airlines, Inc v. Indus. Claims Appeals Office,* 993 P.2d 1152 (Colo. 2000). Here, the Department assigned dispositive significance to the present tense of the regulation's language, an interpretation which the legislature has specifically forbidden. C.R.S. § 2-4-104 (in interpreting statutes, "[w]ords in the present tense include the future tense."). Courts have relied upon this rule to interpret statutory language to accomplish its purpose. *See, e.g., People in Interest of D.L.R. v. Dist. Ct.,* 638 P.2d 39, 42 (Colo. 1981)(statutory definition of neglected or dependent child as one "[w]ho lacks proper parental care" interpreted to read "lacks or will lack proper parental care."). This rule of statutory construction has been applied not only to statutes, but also to ballot measures, including citizen-initiated measures. *Tabor Foundation v. Regional Transp. Dist.,* 417 P.3d 850, 860 (Colo. App. 2016); *Huber v. Colo. Mining Ass'n,* 264 P.3d 884, 889 (Colo. 2011). The appellate courts "construe an administrative regulation or rule using rules of statutory interpretation." *Schlapp v. Colorado Dept. of Health Care Pol.& Fin.,* 284 P.3d 177, 180 (Colo. App. 2012)(*citing Regular Route Common Carrier Conference v. Pub. Util. Comm'n,* 761 P.2d 737, 745 (Colo. 1988).

Interpreting the regulatory definition of "fair consideration" in accordance with C.R.S. § 2-4-104 would seem particularly appropriate given that it is a regulation regarding pooled trusts. By definition, trusts exist to provide for future care and support of beneficiaries, often many years or even decades into the future. To interpret § 8.100.7. F.1.c to require immediate, one-to-one correspondence of value as between the assets transferred and the benefit derived would effectively mean that no pooled trust could ever overcome the presumption, no matter how structured or "frontloaded" the benefits. This, in turn, would render the rebuttable presumption created by § 8.100.6.c.ii) virtually meaningless, because no amount of evidence could ever overcome the presumption. Such

a result is impermissible as a matter of statutory interpretation. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1220 (Colo. 2002)("it is our duty to avoid interpretations that either render language of a statute meaningless or absurd, *AviComm, Inc. v. Colo. Pub. Util. Comm'n,* 955 P.2d 1023, 1031 (Colo. 1998)...").

While an agency is normally "entitled to deference in the interpretation and application of its own rules," *Ricci v. Davis,* 627 P.2d 1111, 1118 (Colo. 1981), this rule is inapplicable when the interpretation of a statute by those charged with its administration has not been uniform. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). Here, the evidence at the hearing indicated that, and the Department concedes that, it formerly construed the law and agency rules as allowing the presumption against fair consideration to be rebutted with evidence similar to Plaintiff's, i.e., by an "actuarially sound" spending plan , whereas the Department currently does not. These are two opposing interpretations by the same agency. Therefore, the court need not defer to the current Department's statutory interpretation.

In summary, the Department's conclusion that a transfer into a pooled trust must have a full and immediate exchange of value is not compelled by the language of the regulation's definition of "fair consideration."

2. The regulation's treatment of promissory notes and annuities is inapposite

The Department also relied upon the fact that the Medicaid regulations specifically address two other forms of asset which contemplate a future benefit to a Medicaid applicant, those being promissory notes and annuities, but do not similarly address pooled trust "spending plans," to determine that "it cannot be concluded that an alternate valuation date was intended." Final Agency Decision, at 3; OACR, at 274. While this argument seems to be a variant of the principle of statutory interpretation *expresio unius est exclusio alterius,* candidly the court does not understand it. The Department elaborates in its Answer Brief by pointing out that, in the case of promissory notes, it is only where there is no ability to cancel the balance due upon the death of the lender that they will not be counted as a resource and considered to be a transfer without fair consideration, § 8.100.5.M.3.O, and, in the case of annuities, in order to be eligible for Medicaid LTC and to avoid transfer penalties, an annuitant must name the Department as the remainder beneficiary of any irrevocable annuity. § 8.100.7.I.5.b. Def. Ans. at 21-22. The Department argues that these provisions essentially guarantee that the Medicaid applicant will always receive full value for their transfer, even if they die before the payments on the promissory note or installments on the annuity terminate. *Id.* The Department concludes that "annuities ensure that full consideration is exchanged because any remainder is used to reimburse the State for something of value that was provided to the individual - that individual's medical claims." *Id.*, at 22.

This argument simply overlooks the unique characteristic of pooled trusts under both federal and state law - and one which distinguishes them from special needs trusts and income trusts - which is that they are not required to reimburse the state for the

medical assistance received by the beneficiary out of any remaining balance in her sub-account upon her death. 42 U.S.C. §1396p(d)(4)(C)(iv); C.R.S. 15-14-412.9(2)(e). *Cf.*, 42 U.S.C. § 1396p(d)(4)(A); C.R.S. §15-14-412.8(2)(b); 42 U.S.C. § 1396p(d)(4)(B); C.R.S. § 15-14-412.7(3)(e). [5] Therefore, to the extent that a balance remains in the beneficiary's subaccount upon their death, which the trust decides to retain and therefore neither it nor her estate owes it to the state, it is difficult for this court to understand how the beneficiary has not received fair consideration for her deposits into a pooled trust.

3. CMS' non-binding internal advice is not consistent with Colorado law regarding trusts.

Although acknowledging that they are not binding on this court, the Department urges the court to find that the Final Agency Decision is consistent with the interpretation of the transfer rules advanced by the federal Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") in a series of memoranda. Apparently for a number of years following its enactment in OBRA '93, many states did not enforce the under 65 exemption from the transfer rules with respect to pooled trusts. However, starting in 2008, various regional offices of the CMS issued memoranda which provided as follows:

> Although a pooled trust may be established for beneficiaries of any age, funds placed in the pooled trust established for an individual age 65 or older *may* be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in the trust, the person gives up ownership of those funds. Since the individual *generally* does not receive anything of comparable value in return, placing funds in trust is usually a transfer for less than fair market value.

Exhibit A, Def. Ans., Memorandum of May 12, 2008 from l ıl to All Medicaid State Agencies (emphasis supplied). *See, In Re: Pooled Advocate Trust, supra,* 813 N.W. 2d at 143-146. Shortly after ` ` Memoranda, the Associate Regional Administrator for Region VIIı, which includes Colorado, duplicated the advice contained in Mr. McGreal's Memoranda, and added that "[i]f States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions they are not in compliance with the statute." Exhibit B, Def. Ans., Letter of February 20, 2009 from Richard C Allen, Associate Regional Administrator, to Dr. Sanddeep Wadhwa, Medical Director, Colorado Department of Health Care Policy & Financing.

Similarly, in its State Medicaid Manual, which is binding upon the states, CMS provides as follows regarding the under 65 exemption:

---

[5] In fact, a state's attempt to require repayment from a pooled trust has been held to be preempted by the Medicaid statute. *Lewis v. Alexander,* 685 F.3d 325, 348 (3d Cir. 2012)(Pa. law).

> Establishing an account in [a pooled trust] *may or may not constitute a transfer of assets for less than fair market value.* For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. As a result, a special needs trust established for the disabled individual who is age 66 *could be* subject to a transfer penalty.

State Medicaid Manual, § 3259.7.B (emphasis supplied). While such pronouncements of the CMS certainly "'warrant[] respectful consideration' due to the complexity of the statute and the considerable expertise of the administering agency," *Cmty. Health Ctr. v. Wilson-Coker,* 31 F.3d 132, 138 (2d. Cir. 2002)(*citing Wisconsin Dept. of Health & Family Services v. Blumer,* 534 U.S. 473 (2002)),[6] the court notes that the CMS merely observes that the transfer of assets into a pooled trust "may" be subject to a transfer penalty, and "may or may not constitute a transfer of assets for less than market value." In neither memoranda does CMS state unequivocally that in its judgment a transfer by a beneficiary over the age of 65 into a pooled trust is invariably subject to a transfer penalty. *See,* Courts emphasis of quoted passages, *supra.* As noted, the Department apparently recognized that the particular facts of a case could lead to different conclusions regarding whether the particular transfer was or was not for fair consideration, and therefore created the rebuttable presumption mechanism to be applied in the context of an adversarial hearing, such as the one conducted before ALJ Light.

With respect to the soundness of CMS's analysis based upon the nature of trusts, the court must instead rely upon the Colorado law of trusts. "State law obviously plays a role in determining ownership, property rights, and similar matters." *Lewis v. Alexander*, 685 F.3d 325, 344 (3d Cir. 2012). "There is no reason to believe [Congress] abrogated States' general laws of trusts or their inherent powers under those laws...Congress did not pass a federal body of trust law, estate law, or property laws when enacting Medicaid. It relied and continues to rely on state laws governing such issues." *Id.* at 347. Under Colorado law, the creation of a trust separates legal and equitable title to property. *In re Estate of McCreath*, 240 P.3d 413, 421-22 (Colo. App. 2009). "A 'trust' is the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title of which is vested in another." *Bowes v. Cannon*, 50 Colo. 262, 266 (1911). Thus, upon deposit of her assets into the pooled trust, Plaintiff not only obtained the value of the Spending Plan, but also retained her equitable title in the assets. Thus, it would be contrary to the Colorado law of trusts for the court to conclude, as the CMS memoranda assert, that a person who places funds in a pooled trust "gives up ownership of those funds," and "does not receive anything of comparable value in return."

---

[6] However, a legal interpretation set forth in an opinion letter, policy statement, agency manual, or enforcement guideline is only entitled to "some deference." *Christensen v. Harris County*, 529 US 576, 587 (2000). These materials are not entitled to the same deference as regulations because they "lack the force of law" and have not been "subject to the rigors of the Administrative Procedure Act, including public notice and comment," and are therefore only "entitled to 'some deference.'" *Id.* at 587.

E. The Spending Plan, combined with the CFPD's fiduciary duties, constitutes fair consideration for purposes of rebutting the presumption.

The Department argues that to constitute fair consideration and overcome the presumption, a pooled trust agreement must be completely binding on the trustee, and cannot allow for any modification. Def. Ans. at 26. It argues that Plaintiff has "neither a legal entitlement to receiving the items listed on her Spending Plan, nor does CFPD have any real legal obligation to provide them as listed therein." *Id.* at 28. In its Final Agency Decision, the Department noted that CFPD has a fiduciary obligation to act in the best interest of Plaintiff, but held that the "flexible language" in the Spending Plan does not guarantee the purchases will be executed at the estimated amounts. OACR, at 274-75.

CFPD is bound by terms of the Master Trust Document, and the Spending Plan tailored to Plaintiff. The Master Trust Document reads, "This Declaration of Trust shall be irrevocable." Master Trust Document, Art. X, at 5. The pooled trust contains spendthrift provisions, preventing both voluntary and involuntary transfers of the assets by the beneficiaries. *Id.,* Art. III, ¶ 4 at 3. Finally, the trust is discretionary: "Trustee shall pay or apply for the benefit of each Beneficiary. . . . as the Trustee, in its sole discretion, may from time to time deem necessary or advisable for the satisfaction of that Beneficiary's supplemental needs, if any," *Id.,* Art. III, ¶ 2 at 2; "The Trustee shall have full power and authority, in its absolute discretion, without recourse to any court of any notice whatsoever, to do all acts and things necessary to accomplish the purposes of this Trust," *Id.,* Art. VI, ¶ 4 at 4; "The Trustee, in its sole discretion, may make any payment under the Trust (a) directly to the Beneficiary, (b) in any form allowed by law, (c) to any person deemed suitable by Trustee, or (d) by direct payment of a Beneficiary's expenses." *Id.,* Art. VI, ¶ 5 at 4. The Spending Plan incorporates these terms, and sets out in detail how Plaintiff's assets will be spent for her sole benefit.

The court finds that because of the legal duties and responsibilities imposed by law on trustees, the Spending Plan and Master Trust Documents are sufficiently binding to constitute fair consideration for purposes of pooled trusts funded by individuals age 65 or older. The Spending Plan does not allow for arbitrary and meaningless spending by CFPD. Discretion to alter spending is limited to "changes in circumstance" stemming from a "reasonable medical need or financial necessity." The trustee's fiduciary duty to the beneficiary is not limited to only acting in the best interest of Plaintiff, but "to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another." C.R.S. 15-1-804(1). Even trustees with sole and unfettered discretion cannot act abusively or recklessly. *Rippey v. Denver U.S. Nat'l Bank*, 273 F.Supp. at 736. CFPD is bound to the parameters of the Spending Plan, even with sole discretion under the Master Trust Document.

The Department is troubled by CFPD's actions in deviating from the Spending Plan, both in that the estimated expenditures were not accurate or followed, and that it made extra expenditures not listed in the Plan. Def.'s Ans. at 29. However, there was no evidence presented at the hearing that any of the expenditures that CFPD made were not for Plaintiff's benefit. Certainly, if CFPD abuses its power as trustee of a discretionary trust, the remedy lies in Plaintiff suing to enforce the trust document, not with the Department withholding Medicaid LTC benefits. While a trustee may, at some point in the indefinite future, abuse its power, that does not mean that the beneficiary did not get the benefit of his or her bargain when originally setting up the trust and funding it. Because trustees are bound by duties and loyalties to their beneficiaries, even for discretionary trusts, the court finds that the Spending Plan constitutes "fair consideration."

F. The Department improperly created a rule outside of the rulemaking process by interpreting "fair consideration" as requiring an immediate exchange of value.

Finally, Plaintiff contends that the Department's interpretation of "fair consideration" to require an immediate exchange of full value amounts to an unpublished rule, which the APA prohibits an agency from relying upon. C.R.S. § 24-4-103(10). Op. Br., at 25-26. The Department acknowledges that it used to accept spending plans like CFPD's with Plaintiff to rebut the presumption against transfers without fair consideration, but "upon receiving guidance from CMS and seeking legal counsel on the issue, the Department is more strictly enforcing the already-existing requirement in order to be consistent with the governing federal and state statutes and regulations." Def. Ans., at 40-41.

"Rule" is defined in the APA as "the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency." C.R.S. § 24-4-102(15). "In contrast to a rule, a general statement of policy does not establish a 'binding norm' nor does it finally determine the issues or rights to which it is addressed." *Meyer v. Colo. Dept. of Social Services*, 758 P.2d 192, 195 (Colo. App. 1988)(*citing* 2 K. Davis, *Administrative Law Treatise* 7.5 (2d ed. 1979)). A state agency may reinterpret a rule to comply with federal law without engaging in formal notice and comment rulemaking. *Schlapp v. Colo. Dep't of Health Care Policy and Financing*, 284 P.3d 177, 185 (Colo. App. 2012). The purpose of this allowance is to prevent agencies from being bound to incorrect misinterpretations of their rules. *Id.*

Here, the Department formerly allowed evidence similar to Plaintiff's, like CFPD's Spending Plan, to rebut the presumption that a transfer was made without "fair consideration." CFPB's Executive Director testified at the hearing that actuarilly-sound spending plans were routinely approved by Ms. Gardner's predecessor as the Department's trust officer. Tr. at 80-81. By contrast, Ms. Gardner acknowledged that she has found "that there is a transfer without fair consideration" on each such spending

plan submitted to her. Tr. at 40. While ALJ Light found that Plaintiff's Spending Plan, augmented by the testimony of ı demonstrated that the transfer had been for "fair consideration," that result was reversed in the Department's Final Agency Decision on the grounds that Plaintiff had not received full and immediate and present consideration for her transfer. The Department argues that under *Schlapp*, it merely reinterpreted "fair consideration" to better align with federal law, and thus did not need to engage in formal notice and comment rulemaking to correct the previous misinterpretation. Def.'s Ans. at 39-40.

However, this case is readily distinguishable from *Schlapp,* which dealt with the medical need requirement, a "fundamental requirement of both federal and state enabling statutes." *Schlapp v. Colo. Dep't of Health Care Policy and Financing*, 284 P.3d at 184. In *Schlapp*, the Department began enforcing the medical need requirement more consistently with the governing federal and state statutes based on the fact that it was expressly set forth in federal and state law. Here, by contrast, the full and immediate exchange of value requirement set forth by the Department in its Final Agency Decision is nowhere reflected in federal or state statutes or regulations. Indeed, its genesis is more accurately characterized as a lack of federal or state statutory guidance. The federal under 65 exemption to the transfer rules provides the states with virtually no guidance as to what is to occur when a pooled trust beneficiary over the age of 65 transfers assets into the trust. 42 U.S.C. § 1396p(c)(2)(B)(iv). Colorado's regulatory solution to this gap in the federal statute was to create a rebuttable presumption that the transfer had been without fair consideration, §8.100.7.E.6.c.ii), which clearly was intended to leave the matter to a fact-specific resolution in each case.

The Department contends that its change in approach to spending plans generated by pooled trusts was based on "guidance from CMS," Def. Ans., at 40. However, to the extent that such guidance consisted of the memoranda quoted *supra,* those memoranda contain no specific directive, and in fact seem to contemplate that, depending upon the facts of particular case, a transfer "may or may not" result in an eligibility penalty. In this respect, Colorado's procedure of allowing an adversary hearing at which the pooled trust beneficiary is allowed to present evidence to rebut the regulatory presumption that the transfer was without fair consideration, would seem to be in compliance with CMS's guidance. Further, the fact that the Department used to routinely accept spending plans as adequate to rebut the presumption that a transfer had been without fair consideration, but has never done so during ' s tenure, strongly suggests that, in fact, the Department is simply applying a new and unpublished rule, not in accord with the procedures of the APA, and in violation of it. C.R.S. 24-4-103(10). *See, e.g., Jefferson Cnty. School Dist. R-1 v. Division of Labor in the Dept. of Labor and Employment*, 791 P.2d 1217, 1219 (Colo. App. 1990).

CONCLUSION

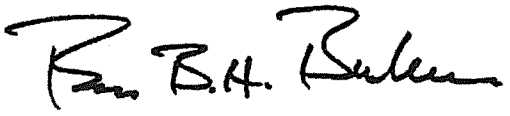
For all the foregoing reasons, the court concludes that the Department's Final Agency Decision is unsupported by substantial evidence when the record is considered as a whole, arbitrary and capricious, and not in accord with the procedures or procedural

limitations of the APA, within the meaning of C.R.S. § 24-4-106(7). Accordingly, the Final Agency Decision of May 29, 2015, including the period of Plaintiff's ineligibility for Medicaid LTC benefits, is HEREBY HELD UNLAWFUL AND SET ASIDE. The court is without authority to award costs against the State, as Plaintiff requests. C.R.C.P. 54(d); *Lucero v. Charnes,* 607 P.2d 405 (Colo. App. 1980).

In its Order Re: State Defendants' Partial Motion to Dismiss, dated September 21, 2016, the court dismissed the Plaintiff's Fourth Claim for Relief for a declaratory judgment, and all of Plaintiff's Fifth Claim for Relief based upon 42 U.S.C. §1983 except for Plaintiff's claims pertaining to 42 U.S.C. §§ 1396a(a)(18), 1396p(c)(4), and 1396p(c)(2)(C) to the extent that she seeks injunctive relief and not damages. In an order dated September 26, 2016, the court stayed those remaining § 1983 claims pending this resolution of the APA claims. Accordingly, the court ORDERS that, within 10 days of the date of this order, the parties shall submit a joint Proposed Case Management Order pertaining to the resolution of the remaining claims, including any request for certification under C.R.C.P. 54(b). Unless and until a case management order is entered, the stay pertaining to Plaintiff's remaining § 1983 claim shall remain in place.

DATED this 31st day of July, 2018.

BY THE COURT:



Ross B.H. Buchanan
Denver District Court Judge