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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o Attorney Jeffery Drach
500 Third St., Suite 202
Wausau, WI 54403

PROPOSED DECISION

MRA/135337

PRELIMINARY RECITALS

Pursuant to a petition filed September 22, 2011, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Marathon County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on October 25, 2011, at Wausau, Wisconsin. At the parties' request, the hearing record was held open to December 12, 2011, for submission of briefs. Briefs from both sides were received. The petitioner did not object to a 30-day extension to the *Moua* decision issuance deadline.

The issue for determination is whether the Department correctly denied the petitioner's Elderly/Blind/Disabled MA application due to excess assets. The problematic assets are IRAs that consist of commercial annuities.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
c/o Attorney Jeffery Drach
500 Third St Suite 202
Wausau, WI 54403

Petitioner's Representative:

Attorney Jeffery J. Drach
500 Third Streeet Suite 202
Wausau, WI 54403

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Atty. Scott Corbett
Marathon County Department of Social Services
400 E. Thomas Street
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted] is a resident of Marathon County.

2. The petitioner applied for EBD/Long-term Care MA on July 29, 2011, with a request for backdating to May 1, 2011. The county agency requested asset verification, which was received on August 16, 2011. The agency also had some asset verification from a previously filed application (denied), which denial is not relevant here. Further communication between the petitioner's attorney and the county agency ensued, with additional verification being submitted on September 7, 2011.

3. The petitioner resides in a long-term care facility; her husband [redacted] resides in the community. Therefore, "spousal impoverishment" provisions apply to the case.

4. On September 15, 2011, the county agency issued written notice to the petitioner advising that her application had been denied due to excess assets. The asset limit for the couple was established as being $54,031.21. The agency determined that the non-exempt assets totaled $81,206.05.

5. In tallying the non-exempt assets, the agency included two Individual Retirement Accounts (IRAs) owned by [redacted] The agency included them by relying on a portion of the *Medical Eligibility Handbook*, and by receiving advice from the Wisconsin Department of Health Services' Call Center. County agencies have been instructed by the Department to contact the Call Center when they are unsure of a particular application of *Handbook* instructions.

6. The IRAs contain revocable annuities with Jackson National Life Insurance Company. One annuity is labeled as an individual retirement annuity (contract # [redacted] and the other is labeled as a "simplified employee pension" (contract # [redacted] The petitioner's spouse purchased the annuities with the funds from a prior retirement account.

DISCUSSION

The issue for determination is whether the Individual Retirement Account (IRA) annuity owned by Mr. [redacted] the community spouse, must be excluded in determining his wife's institutional MA eligibility. This is a so-called "spousal impoverishment" case, wherein an "institutionalized spouse" resides in a nursing home, and has a "community spouse" who is not institutionalized or eligible for MA Waiver services. *See* Wis. Stat. § 49.455(1).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. See the *Medicaid Eligibility Handbook*, (*Handbook*), § 16.1, at http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm. All available assets owned by the couple are to be considered unless exempt. Homestead property, one vehicle, and burial funds are examples of assets that are exempt. The couple's total non-exempt assets are compared to the "asset allowance" to determine eligibility. If the couple's assets are at or below the determined asset limit, the "institutionalized" spouse is eligible for MA. If the assets exceed the above amount, as a general rule the applying spouse is not MA eligible. See, Wis. Stat. § 49.455(6)(b).

The facts in this case are not in dispute. There is a legal dispute here because the community spouse's retirement funds are in two IRAs that contain revocable annuities. The county agency worker was uncertain as to whether to include the petitioner's IRA funds in the asset total and sought guidance from the Department's Call Center. Her confusion was understandable given the following two provisions of the *Handbook*:

16.7.4.1 Annuities Purchased After March 1, 2004

(For annuities purchased before March 1, 2004 refer to subsection 16.7.4.2)
Treat Annuities purchased after March 1, 2004 as available assets in accordance with the following:

16.7.4.1.1 Annuities That Can Be Surrendered:
If the annuity's cash value is available for withdrawal (minus any penalty) the annuity can be "surrendered."

...

16.7.21 Retirement Benefits

3. Disregard work-related retirement benefit plans or individually owned retirement accounts, such as IRAs or Keoghs, of an ineligible spouse in an EBD case. This policy includes the disregard of retirement funds held by the community spouse in spousal impoverishment cases.

The Call Center advised the worker to treat the IRAs as non-exempt because they contain annuities, and annuities are not exempt assets. The petitioner argues that IRAs and other pension accounts are exempt, and the fact that an IRA happens to contain an annuity is irrelevant, particularly when the annuity was purchased with funds from a previous retirement account.

States that elect to participate in Medicaid must establish reasonable standards for determining an applicant's eligibility which are "no more restrictive" than the eligibility requirements under the Supplemental Security Income (SSI) Act. See 42 U.S.C. § 1396a(r)(2)(A). This means that in determining whether an asset may be excluded from an eligibility determination, the Department cannot use a methodology that is more restrictive than that used by the SSI (Supplemental Security Income) Program. *See* 42 U.S.C. § 1396a(a)(10)(C)(i)(III). A methodology is "considered to be 'no more restrictive' if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance." 42 U.S.C. § 1396a(r)(2)(B). Consequently, the Department cannot treat as available resources, any assets that the SSI regulations would not treat as available resources.

The SSI rule at 20 C.F.R. § 416.1202(a) discusses treatment of retirement benefits. It specifically exempts pensions and individual retirement accounts:

(a)...
(1) Pension funds that the ineligible spouse may have. Pension funds are defined as funds held in individual retirement accounts (IRA), as described by the Internal Revenue Code, or in work-related pension plans (including such plans for self-employed persons, sometimes referred to as Keogh plans);

However, the SSI authorities also treat a revocable annuity that exists outside the confines of a pension plan as a non-exempt asset. 20 C.F.R. § 416.1201(a)(1). *See* also, the *SSI Program Operations Manual System* (*POMS*), SI 01110.115. If the annuities in this case were not part of an IRA, they would clearly be available assets and not excluded from the eligibility determination. However, in this case they are contained in IRAs, and the SSI rules do not definitively advise as to their treatment.

The closest Wisconsin case on this question is *Keip v. DHFS*, 2000 WI App 13, 232 Wis.2d 380, 606 N.W.2d 543 (Ct. App. 1999), which was cited by the petitioner. The court ruled that the IRA asset at issue in *Keip* was excluded from the asset assessment in determining MA eligibility. However, in *Keip* the community spouse's IRA-enclosed annuity was *irrevocable*. The annuities in this case are revocable.

In deciding whether a *revocable* annuity contained in an IRA should also be exempt, I note the existence of Transmittal 64, or §3258.9(B) of the *State Medicaid Manual*, HCFA, No. 45-3, (November 1994). This is guidance from the federal Centers for Medicare and Medicaid Services (CMS) on annuities. While the focus of the CMS guidance was on divestments, the overriding philosophy was an attempt to "avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets." It appears that the IRA annuities were created in this case as part of the community spouse's long-term employment and had nothing to do with his wife's recent application for MA.

Finally, there is a common sense basis for deciding in favor of the petitioner. If the husband's retirement funds were in a traditional IRA consisting of stocks, bonds, and savings accounts, there would have been no question that they would have been excluded. This is so even though the community spouse could withdraw funds with a penalty at any time. It does not make sense to find that because an IRA is in a revocable annuity with accessible funds, it should be treated any differently than the traditional IRA, which has accessible funds. In the absence of clear legal authority holding that a revocable annuity within an IRA is non-exempt, I conclude that the fact that the funds are in an IRA trumps the fact that they are also in revocable annuities. This analysis and result is consistent with that in another pending Proposed Decision on the same topic, MGE/136461, by Administrative Law Judge Nowick.

CONCLUSIONS OF LAW

The community spouse's IRA funds in revocable annuities are not countable assets for determining petitioner's Institutional MA eligibility.

THEREFORE, it is **ORDERED**

That if, and only if, this Proposed Decision is adopted by the Secretary of the Department of Health Services in a Final Decision, then the petition for review herein is remanded to the Marathon County Department of Social Services with instructions to redetermine the petitioner's Institutional MA eligibility retroactive to May 1, 2011, by excluding the community spouse's two IRAs. This action shall be taken within 10 days from the date of the Final Order.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decisions is described in Wis. Stats. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 10th day of February, 2012

/s/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

c: [redacted]