



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

MRA/167179

The attached proposed decision of the hearing examiner dated September 30, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

**PRELIMINARY RECITALS**

Pursuant to a petition filed July 13, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on August 04, 2015, at Waukesha, Wisconsin.

The issue for determination is whether Petitioner's income has been correctly determined by inclusion of an annuity payment from an annuity owned by Petitioner but where the payment is made to Petitioner's spouse.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney Brenda R. Haskins  
3866 Johns St  
Madison, WI 53714

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Julie Miller

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

David D. Fleming  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. Petitioner resides in a nursing home. He has a community spouse.
3. An application for institutional Medicaid was filed in April 2015. That application was approved with eligibility backdated to March 1, 2015.
4. Petitioner executed a Durable Power of Attorney in 2013 that names his spouse and three of his children as his power of attorney and gives each the right to act individually and separately from the others. Exhibit #C-2. It gives the POAs expansive rights as to Petitioner's IRA and to annuitize his retirement accounts. Exhibit # C-2, at page 3.
5. The agency determined that Petitioner had gross income of \$3318.20 per month and after a special needs allowance of \$45.00 his patient liability amount was \$3273.20 per month.
6. This appeal was filed to contest the inclusion of the annuity payment as part of Petitioner's income. While it was expected that the monthly payment from the annuity would be \$1362.20 it was actually a gross of \$1141.68. The agency agreed to make this correction.
7. Petitioner's community spouse has income in excess of the minimum monthly maintenance amount of \$2980.50; thus none of Petitioner's income has been allocated to the community spouse.
8. Petitioner, or someone acting on his behalf, purchased an annuity with his IRA funds on March 31, 2015. Petitioner is named as the owner of the annuity and he is also named as the annuitant. The annuity is irrevocable. The amount of the annuity is \$256,415.00. The income is \$1141.68 monthly (corrected from the initial thought that it was \$1362.20). Petitioner's spouse is the payee; she receives the monthly check from the annuity in her name, not her name as POA for Petitioner.

## DISCUSSION

I will say at the outset here that in writing this decision I am frustrated that the annuity contract, or at least relevant provisions, e.g., as to definitions, was not provided for this record. Rather, what was referred to as the 'contract' by the parties is actually 'Transaction Detail Report'. See Exhibit # C1.

The issue here is whether the income from the annuity should be counted as part of Petitioner's income or should be excluded as the payment is made to Petitioner's wife in her name alone. This issue has been presented to the Division of Hearings and Appeals in the past in a similar though not identical case. GFG, Division of Hearings and Appeals case # MED-66/47172, issued as a Proposed Decision on February 2, 2001 and adopted as a final Decision by the Department of Health and Family Services on March 12, 2001. Neither party to this case noted that case in the course of the instant appeal proceedings so a brief description here is warranted.

In GFG Petitioner or someone acting on his behalf purchased an annuity with Petitioner's IRA funds. Petitioner was the owner and annuitant but the payee was Petitioner's spouse in her name alone. The Division of Hearings and Appeals decision concluded that income in the name of a community spouse could not be deemed to the institutionalized spouse as the Wisconsin Administrative Code, at § HFS 103.075(6)(a)3, prohibited such attribution. The decision found that a Medicaid Handbook provision, Medicaid Handbook §11.6.4 (04-01-00), stating that the annuitant is the payee had to yield to the Administrative Code provision.

Both the Administrative Code and the Medicaid Handbook provisions remain the same today. Though the Administrative Code provision was not noted by Petitioner, the following was cited:

42 U.S. Code § 1396r-5 - Treatment of income and resources for certain institutionalized spouses

...

**(2) Attribution of income** In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

**(A) Non-trust property** Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides—

- (i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

...

*42 U.S. Code, Chapter 7, Subchapter XIX, § 1396r-5, (b)(2).*

This case does, however, present an argument and a perspective not addressed in the 2001 Decision. Here the agency argues that Petitioner by himself or via the powers given to his community spouse as POA can make the annuity payment available for Petitioner. The Medicaid Handbook describes income availability as follows:

...

Income is available when:

1. It is actually available, and
2. The person has a legal interest in it, and
3. The person has the legal ability to make it available for support and maintenance.

...

*Medicaid Handbook, §15.1.5.*

The agency notes that Petitioner by himself or via powers granted to his POA has the ownership and the legal ability to make the annuity payment available for Petitioner's maintenance and support. Somewhat weaker is the 'actually available' argument. Essentially the argument, as I understand it, is that steps have been taken to avoid making the funds actually available. I see that there may be a difference between income belonging to the community spouse and income that would be due the institutionalized spouse but deliberately diverted from that spouse. Can an institutionalized spouse owning a rental property that was not selling and, therefore, at least temporarily an unavailable asset, avoid contributing that stream of income regardless of the amount toward his cost of care by simply having the tenants make checks payable to the community spouse? Can an institutionalized spouse endorse a check payable to him or her and make it payable to the community spouse and thereby bypass making it available for the cost of care?

The problem for the agency in prevailing on that argument is that the record does not establish that Petitioner could any longer make the income available to himself. All that we know is that monthly payments from an irrevocable annuity are being made to Petitioner's spouse. Without knowing if it is legally possible to now change the payee I am left to the law that states that payment of income to one

spouse is not considered available to the other. For this reason I am following the Final Decision in # MED-66/47172 and concluding that the annuity payment should not be deemed as Petitioner's income.

### CONCLUSIONS OF LAW

That the annuity payment involved here may not be attributed to Petitioner and used in determining his cost of care.

**THEREFORE, it is**

### ORDERED

That this appeal is remanded to the agency with instructions to remove the annuity payment involved here from Petitioner's total income and adjust his cost of care contribution accordingly, ***if and only if***, this decision is accepted as Final by the Secretary of the Department of Health Services.

### REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

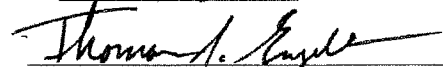
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of  
Madison, Wisconsin, this 11<sup>th</sup> day  
of December, 2015.

  
Thomas J. Engels, Deputy Secretary  
Department of Health Services