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

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In the Matter of

505 S 24th Ave Suite 100  
Wausau, WI 54401

**AMENDED DECISION ON REHEARING**  
Case #: MRA - 183762

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on September 26, 2017, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Wood County Human Services - WI Rapids regarding Medical Assistance (MA), a hearing was held on November 30, 2017, by telephone. The hearing was rescheduled once from November 2, 2017 at the petitioner's request. The petitioner requested a rehearing on February 1, 2018, which was granted. This amended decision reverses and replaces the original decision dated January 12, 2018.

The issue for determination is whether the county agency correctly attributed income from an annuity to the institutionalized spouse for purposes of determining the petitioner's cost share.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

[REDACTED]

**Petitioner's Representative:**

Attorney Jeffery J. Drach  
Drach Law Firm  
500 Third Street Suite 202  
Wausau, WI 54403

**Respondent:**

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

By: Shawna White

Wood County Human Services - WI Rapids  
220 Third Avenue South, Suite 4  
Wisconsin Rapids, WI 54495

**ADMINISTRATIVE LAW JUDGE:**

Kristin P. Fredrick  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner is a resident of Wood County. The petitioner resides in a residential nursing facility. She is married and has a community spouse.
2. On May 5, 2017 the petitioner obtained an irrevocable annuity through Standard Insurance Company. The annuity contract lists the petitioner as owner and annuitant. The petitioner named her community spouse as a beneficiary and payee in the contract application. The annuity pays a monthly benefit of \$537.64. (Exhibit B)
3. An application for Medicaid was filed on June 13, 2017. (Exhibit A, Item 1)
4. On August 24, 2017 the county agency sent the petitioner's representative an About Your Benefits notice advising her that she was eligible for community waiver/long term care benefits. (Ex. R-1)
5. In determining the petitioner's eligibility for MA, the county agency attributed income received through the annuity contract in the amount of \$537.64 as petitioner's income on top of the petitioner's social security income of \$888.00 per month. The agency did not calculate a cost share owed by the petitioner at that time.
6. The petitioner appealed the agency's action in attributing the annuity income to the petitioner as opposed to the petitioner's community spouse as payee.
7. The petitioner's community spouse is the sole person named on the check issued by the annuity.

### DISCUSSION

The issue in the present matter is whether the income from an irrevocable annuity owned by an institutionalized petitioner should be counted as part of the petitioner's income when the annuity payment is issued to the community spouse as an irrevocable payee.

An "annuity" is defined to mean a "written contract under which, in return for payment of a premium or premiums, an individual or individuals have the right to receive fixed, periodic payments for life or up to a fixed point in time." Wis. Admin. Code §DHS 103.065(3)(a). An annuity is considered unearned income. See, 20 CFR §416.1121(a); *Social Security Program Operations Manual System (POMS)*, §SI 00830.160 B.1 (found online at <http://policy.ssa.gov/poms.nsf/lnk/0500830160>). An annuitant is the individual who is entitled to receive payment from an annuity. Wis. Admin. Code §DHS 103.065(3)(i).

Institutionalized recipients of MA are required to apply available income toward their cost of care. Wis. Admin. Code, §DHS 103.07(1)(d). According to the *Medicaid Eligibility Handbook (MEH)* income is available 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.
- ...

*MEH*, §15.1.5.

In determining a recipient's eligibility for MA and their contribution to the cost of care for an institutionalized spouse, the agency is to attribute income to a spouse as follows:

1. Except as determined under subd. 2. or 3., unless the instrument providing the income specifically provides otherwise:
  - a. Income paid solely in the name of one spouse is considered to be available only to that spouse.
  - b. Income paid in the names of both spouses is considered to be available one-half to each spouse.
  - c. Income paid in the name of either or both spouses and to one or more other persons is considered to be available to each spouse in proportion to the spouse's interest or, if payment is made to both spouses and each spouse's individual interest is not specified, one-half of the joint interest is considered to be available to each spouse.
2. Except as provided in subd. 3., if there is no trust or other instrument establishing ownership, income received by a couple is considered to be available one-half to each spouse.
3. Subdivisions 1. and 2. do not apply to income other than income from a trust if the institutionalized spouse establishes by a preponderance of the evidence, that the ownership interests in the income are other than as provided in subds. 1 and 2.

Wis. Stat. §49.55(3)(b); see also, 42 U.S.C., § 1396r-5. The Wisconsin Administrative Code provides that non-trust income is treated as income of the "person in whose name the payment is made ..." *if* the institutionalized spouse establishes by a preponderance of the evidence that their ownership interest is other than as provided by the above criteria. Wis. Admin. Code, §DHS 103.075(6)(a)3.

The petitioner in the present matter applied for MA on June 13, 2017. (Exhibit A, Item 1) The petitioner's application did not disclose an interest in an annuity. Rather, the petitioner reported on the application that her spouse was receiving income from an IRA in the amount of \$537.64. (Id) The record establishes that on May 5, 2017 the petitioner obtained an annuity that was funded from an IRA. The named owner and annuitant of the annuity contract is the petitioner. (Ex. B, Annuity Contract, p. 3) The annuity benefit is a monthly payment of \$537.64 that commenced on June 5, 2017. (Id.) According to the annuity contract, the annuity benefits are payable to the Owner. (Ex. B, p. 4) In her application for the annuity, the petitioner identified her husband as beneficiary and payee. (Ex. B, Annuity Application attached thereto) However, the petitioner's spouse is not listed as a joint annuitant or owner of the annuity. By definition under the annuity contract, a beneficiary is a person or entity named to receive death benefits upon the death of the owner of the annuity. (Ex. B, p. 4) The annuity contract is nontransferable, nonassignable and irrevocable, has no cash value and states that neither the petitioner nor her payee may change a designated payee under the contract. (Ex. A, Item 14). The monthly annuity payment names the petitioner's husband only.

The petitioner asserts that by virtue of the annuity benefit payments being made payable to her husband as irrevocable payee, the income should be attributed to him and not her for purposes of calculating the petitioner's cost share.<sup>1</sup> The annuity contract does not define a payee. However, the term "payee" is generally defined as "one to whom money is paid or payable; esp. a party named in commercial paper as the recipient of the payment." *Black's Law Dictionary*, 8<sup>th</sup> Ed.

The petitioner cites to and relies upon a prior Final Decision issued by the Deputy Secretary of the Department of Health Services, DHA Case No. MRA/167179 (12/11/15), wherein the administrative judge concluded that an irrevocable annuity owned by the institutionalized spouse but made payable to the community spouse was not attributed as income to the institutionalized spouse. Based upon the simple fact that the petitioner has established by a preponderance of the evidence that the petitioner's community

<sup>1</sup> I note that the agency had not calculated a cost share for the petitioner at the time this appeal was filed. However, on November 6, 2017 the county agency sent an About Your Benefits notice advising the petitioner that effective December 1, 2017 she would have a monthly cost share of \$114.24.

spouse is the only individual named on the monthly annuity payment check, I am compelled to follow the authority issued by the Department's Final Decision in MRA/167179. Accordingly, I find that pursuant to the terms of the annuity contract, the annuity payments is not available income to the petitioner and that the agency incorrectly attributed that income to the petitioner rather than her community spouse as payee.

### **CONCLUSIONS OF LAW**

The county agency incorrectly attributed income from an annuity to the institutionalized spouse for purposes of determining the petitioner's cost share.

**THEREFORE, it is**

### **ORDERED**

This matter is remanded to the agency to redetermine the petitioner's cost share by attributing the annuity payment as income to the community spouse rather than the institutionalized petitioner. This action shall be completed within ten days of this decision.

### **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**

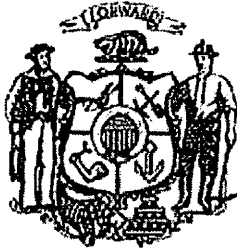
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court and served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, and on those identified in this decision as "PARTIES IN INTEREST" no more than 30 days after the date of this decision or 30 days after a denial of a timely rehearing (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 9th day of March, 2018

/s/

Kristin P. Fredrick  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on March 9, 2018.

Wood County Human Services - WI Rapids  
Division of Health Care Access and Accountability  
Attorney Jeffery Drach