



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MDV - 215927

PRELIMINARY RECITALS

Pursuant to a petition filed on November 13, 2024, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Dane Cty. Dept. of Human Services regarding Medical Assistance (MA), a hearing was held on December 12, 2024, by telephone.

The issue for determination is whether the agency correctly imposed a 253 day divestment penalty period from November 1, 2024 – July 11, 2025.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Leah Jorgensen
Dane Cty. Dept. of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Dane County.
2. On or about October 19, 2019, the petitioner purchased an annuity from [REDACTED] for \$80,000.00. The petitioner is the owner, annuitant, and payee. Terms of the annuity involve annual payments in the amount of \$4,428.56, with the first payment beginning January 1, 2025. The annuity permitted the petitioner to elect to defer first payment to no later than January 1, 2030. The annuity permits the owner to transfer ownership by submitting a request to [REDACTED] and to change the beneficiary. Exhibit 1.
3. In 2021, the petitioner applied for MA. The annuity was disclosed. The agency found the annuity to be an unavailable asset as payments did not begin until 2025. It does not appear that the agency subjected the annuity to divestment rules. The petitioner was found eligible and enrolled in Nursing Home Long-Term Care MA as of August 16, 2021. Exhibit 2 and testimony of agency representative.
4. During the COVID-19 Public Health Emergency, special rules were in place that impacted healthcare benefits and imposition of divestment penalties.
5. Sometime in 2021, the petitioner elected to defer the first payout from the annuity until January 1, 2030, with annual payments of \$6,236.43. Exhibits 1 and 7 and testimony of petitioner's power of attorney.
6. In January 2024, the agency was alerted to the possibility that the annuity was an available asset or subject to a divestment penalty. Exhibit 2.
7. The petitioner's first annual healthcare renewal following the ending of the COVID-19 rules was in June 2024.
8. Notice was issued to the petitioner on July 25, 2024, indicating Nursing Home Long-Term Care enrollment was ending August 1, 2024 due to being over the asset limit. The right, process, and deadline to appeal that determination was set forth in the notice. The deadline was indicated to be September 16, 2024. Exhibit 5.
9. On October 16, 2024, the agency in error removed the annuity from the petitioner's case and issued notice dated October 17, 2024 indicating she was eligible for and enrolled in Nursing Home Long-Term Care as of September 1, 2024. Testimony of agency representative and Exhibit 10.
10. On October 24, 2024, the agency issued notice that the petitioner was being disenrolled from Nursing Home Long-Term Care as of November 1, 2024, due to a \$80,000.00 divestment connected to the annuity, resulting in a divestment penalty period of November 1, 2024 – July 11, 2025.
11. On November 13, 2024, the petitioner filed an appeal.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of long-term care services for a period known as the penalty period. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); Medicaid Eligibility Handbook MEH, §§ 17.1 and 17.3.1. The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient. MEH, § 17.3.2. Divestment does not impact eligibility for Medicaid card services. MEH, § 17.3.1. For a member already enrolled in MA long-term care services, the divestment penalty begins on the first of the month after they are given timely notice. MEH, § 17.3.4. A divestment does not affect eligibility if not made with the intent to qualify for MA. MEH, § 17.2.6.1

In this case, the petitioner was required to conduct her annual MA renewal in June 2024. Upon completion of the renewal her enrollment in Nursing Home Long-Term Care terminated as she was found to exceed the asset limit. She did not timely appeal that disenrollment. Due to agency error, she was re-enrolled in October 2024. Later that same month the agency issued notice that she was being disenrolled as of November 1, 2024 due to the imposition of a divestment penalty associated with the \$80,000.00 annuity. The divestment penalty period was found to be November 1, 2024 – July 11, 2025. For the reasons set forth below, I find the divestment penalty was not appropriate as she still owns the annuity and it is a countable, available asset.

MA policy regarding annuities requires a determination of whether it can be surrendered, i.e., has a cash value available for withdrawal. MEH, § 16.7.4.1. If not, it is considered irrevocable. Id. In this case, the annuity is irrevocable. Next, MA policy provides the following:

16.7.4.4 Availability of Annuities That Cannot Be Surrendered (Irrevocable Annuities)

An irrevocable annuity may or may not be considered an available, countable asset, depending on when it was purchased and whether it can be sold on the secondary market.

If an irrevocable annuity was purchased **prior to March 1, 2004**, it is considered an unavailable asset on the date the settlement option is made final.

If an irrevocable annuity was purchased **on or after March 1, 2004**, it is only considered unavailable if the owner cannot sell the annuity on the secondary market.

To verify the availability of an irrevocable annuity purchased on or after March 1, 2004, the agency must check the annuity contract to see if the annuity (or the right to receive the income stream from the annuity) can be sold:

- If it can be sold, it is considered an available asset unless the applicant or member demonstrates that they have made reasonable attempts to obtain a fair market price by offering the annuity for sale to companies active in the annuities market.
- If it appears that the annuity cannot be sold, verify this by having the annuity contract reviewed by a company active in the annuities market for an opinion of its value to the company. If the company documents an amount at which it values the annuity or the right to the payments, that amount is considered an available asset. The annuity is considered an unavailable asset if the company provides documentation that it places no value on the annuity. Unavailable

annuities must be evaluated for possible divestment (see SECTION 17.2.6.14 IRREVOCABLE ANNUITIES).

MEH, § 16.7.4.4.

In this case, the annuity was purchased after March 1, 2004, and its terms allow the owner to transfer ownership and change the beneficiary. Thus, the annuity can be sold. At hearing, the petitioner's POA confirmed that JG Wentworth was willing to buy the annuity. It appears it was not sold as she did not find the amount offered to be fair. The petitioner did not provide any evidence that would support that position.

Based on the record before me, the annuity is a countable and available asset under MEH, § 16.7.4.4. As such, it should be included in the financial review to determine if she meets eligibility requirements for MA. However, divestment rules do not apply as she still owns the annuity and it is deemed to be a countable, available asset. Converting an asset from one form to another of equal value is not a divestment. See, MEH, § 17.2.3 and 17.2.3.1.

I am remanding the matter to the agency to rescind the October 24, 2024 notice of action imposing the divestment penalty. That action must be completed within 7 days of the date of this decision. Thereafter, the agency is able to redetermine eligibility based on the annuity being a countable, available asset. If the petitioner has a community spouse, the community spouse asset share should also be redetermined. The agency would need to issue notice to the petitioner of any redetermination that impacts continuing eligibility of her benefits, with appeal rights.

CONCLUSIONS OF LAW

The petitioner owns the annuity and it is a countable, available asset; thus the agency erred in treating it as an unavailable asset subject to a divestment penalty.

THEREFORE, it is

ORDERED

That the matter is remanded to the agency to rescind the October 24, 2024 notice of action that imposed a divestment penalty and disenrolled the petitioner from Nursing Home Long Term-Care MA. This action shall be completed within 7 days of the date 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, 4822 Madison Yards Way, 5th Floor North, 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.

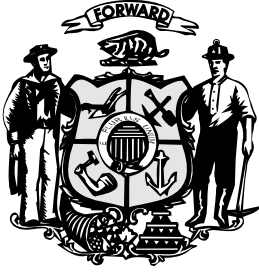
APPEAL TO COURT

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 3rd day of February, 2025

\s _____
Jason M. Grace
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-7709
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 3, 2025.

Dane Cty. Dept. of Human Services
Division of Health Care Access and Accountability