



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o Robert Bertram, Attorney
Bertram & Bertram S C
350 Bishops Way
Brookfield, WI 53005-6221

DECISION

MED-40/65357

The proposed decision of the hearing examiner dated January 13, 2005 is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can be found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 13th day of
May, 2005.

/s

Diane Welsh, Deputy Secretary
Department of Health and Family Services



STATE OF WISCONSIN
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PROPOSED
DECISION

(petitioner)
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MED-40/65357

PRELIMINARY RECITALS

Pursuant to a petition filed September 8, 2004, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to denial institutional Medical Assistance (MA), a hearing was held on December 8, 2004, at Milwaukee, Wisconsin. A hearing set for October 28, 2004, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly denied the petitioner's application for Institutional - MA due to assets in excess of program limits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Robert Bertram, Attorney
Bertram & Bertram S C
350 Bishops Way
Brookfield, WI 53005-6221

Represented by:

Robert E. Bertram
350 Bishops Way
Brookfield, WI 53005-6221

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: No Appearance, ESS
Milwaukee County Dept Of Human Services
1220 W. Vliet St, 2nd Flr.
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx; CARES #xxxxxxxxxx) is a resident of Milwaukee County. He became institutionalized on February 5, 2004. His wife, (petitioner's spouse), lives in the community. He applied for Institutional - MA on or about July 13, 2004, seeking benefits retroactive to July 1, 2004. See, Exhibit #2.

2. Case processing was delayed until August 19, 2004, because the worker was on medical leave. See, Exhibit #5.
3. On August 20, 2004, the income maintenance worker processed the application; she noted that the petitioner and wife each had held deferred annuities, cashed them out and converted them to immediate annuities. The worker determined that under policy this meant that the assets were countable and presently available.
4. On August 23, 2004, the county agency issued a Notice to the petitioner informing him that his application for Institutional - MA was denied, effective July 1, 2004, and thereafter, due to countable assets in excess of program limits, totaling \$169,348.81.
5. The petitioner filed an appeal with the Division of Hearings & Appeals on September 8, 2004.
6. The petitioner, then 79 years old, purchased a deferred annuity from American Investor's Life Insurance Company on February 3, 2003, at a cost of \$47,894.17. The instrument was called a "Flexible Premium Deferred Annuity Policy", that was flexible by its terms, allowing the petitioner to choose one of five settlement options prior to the "annuity date", or receive the whole annuity payoff on the annuity date, which was stated to be February 3, 2018. The beneficiary was (petitioner's spouse), with their children as contingent beneficiaries. See, Exhibit #10.
7. (petitioner's spouse), then 83 years old, also purchased a deferred annuity on June 5, 2001, from Aid Association for Lutherans, called a "single premium deferred annuity", at a cost of \$25,000. This annuity was to become available to her at age 88 via guaranteed monthly life income of \$288.91, or a cash surrender value of \$29,678.88 on June 7, 2006. This deferred annuity also provided by its terms that the petitioner could choose one of five settlement options prior to the "annuity commencement date". The beneficiary was (petitioner), with their children as contingent beneficiaries. See, Exhibit #10.
8. On or about June 16, 2004, (petitioner) "settled" the deferred annuity with American Investor's Life Insurance Company, and converted the proceeds to a "single premium immediate annuity", irrevocable by its terms, that provided for payments of \$618.90, monthly, beginning June 16, 2004, with guaranteed monthly payments for 7 years. The initial cash payment for the annuity was \$46,868.35, on June 8, 2004. By its terms it was non-transferable and non-assignable, and has no surrender value or loan value. The sole beneficiary listed was (petitioner's spouse). See, Exhibit #10.
9. On or about June 23, 2004, (petitioner's spouse) "settled" the deferred annuity with AAL, and converted the proceeds to an immediate annuity, irrevocable by its terms, that provided for payments of \$286.57, monthly, beginning July 1, 2004, with guaranteed monthly payments for 8 years, regardless of whether (petitioner's spouse) was alive or not, and thereafter, the same monthly payment for so long as she lived. The initial cash payment for the annuity was \$27,979.33, on June 23, 2004. The sole beneficiaries listed are sons (redacted) and (redacted), equally, if surviving; otherwise to the payee's estate. See, Exhibit #10.
10. When the two annuities described in Findings of Fact #8 & #9 are excluded as assets, then the petitioning couple's countable assets total \$94,531.13. See, Exhibits #4 & #10.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. WI 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. Medicaid Eligibility Handbook, § 5.10.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county failed to appear for the fair hearing, but it is apparent that it determined that the couple's countable and available assets totaled \$169,348.81, including the estimated value of the two annuities (from June, 2004) described above in Findings of Fact #8 & #9. The appropriate current community spouse asset share for this couple is \$92,760. See, Medicaid Eligibility Handbook, § 5.10.4.2, which is based upon WI Stat § 49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, i.e., here, \$94,760. See, Medicaid Eligibility Handbook, § 5.10.4.3. 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 spouse is not MA eligible.

The agency determined that the two annuities described above in Findings of Fact #8 & #9, were available, countable, assets, and that when included in the couple's assets, they exceeded this level. He was denied Institutional - MA as a result.

As a general rule, when determining the eligibility of an institutionalized individual, only the assets actually available that person shall be considered. WI Admin Code § HFS 103.06. Assets are considered available if they are actually available; the person has a legal interest in the liquidated sum; and the person has the legal ability to make the sum available for support and maintenance. Medicaid Eligibility Handbook, § 4.5.2.

However, effective March 1, 2004, the Department instituted a new written *policy* concerning the treatment of annuity assets. The policy stated that annuities that cannot be surrendered are considered to be available assets unless the MA applicant/recipient can show that at least three companies active in the market are unwilling to purchase the annuity. See, Medicaid Eligibility Handbook, App. 4.5.7.4.1. If such proof is not provided, the agency is supposed to "treat" or "consider" the annuity as available. In net, effect, the annuity is "deemed" available without the proof required by this standard.

The petitioner's attorney asserts two arguments in support of his client's eligibility. First, he asserts that both annuities arising after March 1, 2004, are merely the conversion of pre-March, 2004, existent annuities and should be treated under pre-March 1, 2004, policy regarding annuities. Second, he asserts that he contacted at least three companies in the annuity business but could not obtain any such contemplated letters stating that these entities would not buy the annuities described in Findings of Fact #8 & #9, with the multiple restrictions, i.e., irrevocable, non-transferable, and non-assignable. In fact, he testified that only one company would do so, i.e., a company that wanted a payment of \$150 just to obtain a letter saying it would not buy such an instrument.

I decline to agree with the former argument. The "immediate annuities" executed in June, 2004, clearly arise after the effective date of the new policy. They also incorporate material changes to some important terms, like payout terms and the precise beneficiaries named. If the petitioning couple wanted to have grand-fathered annuities, then they should not have changed the instruments after the effective date and executed new ones, regardless of whether the annuity companies required it. Period.

On the latter point, however, the argument is more persuasive. Attorney Bertram cited to a final Decision by Administrative Law Judge Brian Schneider in DHA Case No. MED-23/65344 (Wis. Div. Hearings Appeals November 1, 2004)(DHFS). In that case, ALJ Schneider determined that the similar annuity in

question had terms that prohibited the sale of the annuity to third parties. That case was different that the instant case in that the petitioner *had provided* three letters from three companies indicating that they were unwilling to purchase the annuity. However, the county agency in that case declined to accept them because there was insufficient proof the three companies were engaged "in the market" for such instruments. Here, Attorney Bertram merely testified that he contacted annuity companies, but could not get them to provide him with such letters at all, or without unreasonable cost.

I have reviewed the Wisconsin statutes and the Wisconsin Administrative Code for any change in law that underpins the Department's policy change vis á vis the treatment of annuities. I can find no such law or amendment. And see, Social Security Administration, POMS, at SI 00830.160 "Annuities, Pensions, Retirement, or Disability Payments"; at PS 01415.055 "Wisconsin, A PS 00-313 Assignment of Income for Bethany L,"(9/6/95); and SI 01730.046, "Transfer of Assets for Medicaid Purposes"; (available online at <http://policy.ssa.gov/poms.snf/lrx/0500830160>, et seq.)

I am satisfied that the rationale advanced by ALJ Schneider in Case No. 65344 applies here as well. Even if petitioner went to one, three, or ten of those companies, the result would be the same because the annuity contracts each do not allow such a sale. The process contemplated by the new policy statement is essentially excessive verification, i.e., verification that is not required to determine eligibility. See, Medicaid Eligibility Handbook, App. 1.2.1. & App. 1.2.2; and see, Income Maintenance Manual, Chapter I - Part C, generally. And see, WI Admin. Code § HFS 102.02, "**Refusal to provide information.**" In addition, there is no proof in this record that the agency ever requested the verification of marketability in writing, either.

I conclude that the Department's new policy statement on annuities exceeds existing law on the availability of assets, and is not in conformance with other departmental rules and policy on when verification and how it is requested. See, WI Admin Code § HFS 103.06(1)(a); WI Admin Code § HFS 102.02; and see, Medicaid Eligibility Handbook, App. 1.2.1. & App. 1.2.2. The policy contained in the Medicaid Eligibility Handbook, at section 4.5.7.4.1 is void ab initio. Prior policy controls the question, and under prior policy, these annuities are not available assets. I make no determination on the, at present, hypothetical question of whether either annuity contract purchased in June, 2004, was a divestment.

CONCLUSIONS OF LAW

- 1) The annuities purchased by the petitioner and his wife in June, 2004, are not available assets because no company that purchases annuities would purchase either due to the terms therein that they are irrevocable, non-assignable and non-transferable.
- 2) The Department's policy contained in the Medicaid Eligibility Handbook, at section 4.5.7.4.1, concerning the availability of annuities, is void ab initio.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county with instructions to: re-determine petitioner's MA eligibility by re-classifying both annuities in question as unavailable assets, retroactive to July 1, 2004, with written notice of the determination results; and certify him for Institutional - MA for all periods for which he is determined otherwise eligible for Institutional - MA, *if any*, retroactive to July 1, 2004. These actions shall be completed within 10 days of the date upon which the Secretary of the Department of Health & Family Services adopts this Proposed Decision as a Final Decision, *if* she so adopts it.

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 IMPLEMENTED 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 & Family Services for final decision-making.

The process relating to Proposed Decision is described in WI Stat § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this 13th day of
January, 2005

/sKenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
313/KDD