



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

(petitioner)
c/o Attorney David P. Cohn
Tammi, Cohn & Cavey
405 E Lincoln Avenue
Milwaukee, WI 53207

MDV-66/71635

PRELIMINARY RECITALS

Pursuant to a petition filed August 17, 2005, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on October 6, 2005, at West Bend, Wisconsin. The hearing record was extended for 21 days for submission of briefs, which were received.

The issues for determination are (1) whether the county agency correctly denied the petitioner's Institutional/Long-Term Care MA application due to an excess asset (an annuity), and (2) whether the petitioner's purchase of the annuity was a disqualifying divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Attorney David P. Cohn
Tammi, Cohn & Cavey
405 E Lincoln Avenue
Milwaukee, WI 53207

Represented by:

Atty. David P. Cohn
405 East Lincoln Avenue
Milwaukee, WI 53207

Respondent:

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: Atty. Chrstine Ohlis, Deputy County Atty.
Washington County Dept. of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Washington County.
2. The petitioner, age 86, entered the nursing home in February, 2004. He executed a Power of Attorney document in March, 2004, naming his granddaughter (redacted) as his attorney-in-fact (hereinafter, POA).
3. In April, 2004, (redacted) applied for a single premium (\$100,000) annuity through Golden Rule Insurance Company. See Exhibit 3. The annuity was actually purchased in June, 2004, and the first monthly payment occurred in July, 2004. Petitioner had a six-year life expectancy at the time of purchase. The annuity has no cash value and is irrevocable. The annuitant and owner is the petitioner, and (redacted) is the beneficiary.
4. The annuity pays the petitioner \$1,410 monthly. It has no guaranteed payout period; the payouts stop when he dies. The annuity allows for a change in ownership and an assignment of the policy. At the time of purchase, the POA/beneficiary chose the payment option (there were several) that paid the lowest monthly income amount to the petitioner and reserved the highest possible return to herself. The selected option pays to (redacted), on the petitioner's death, the product of \$100,000 multiplied by 75% (i.e., \$75,000), minus the annuity payments actually made. If (redacted) had selected the payout option with no return provision to the beneficiary, the petitioner's monthly payment from the annuity would have been \$2,080. (redacted) testified that the 75% return option was selected because the petitioner wanted to ensure some inheritance to his family.
5. The POA applied for Institutional MA for the petitioner on June 20, 2005. The county agency issued written notice of denial of that application on August 2, 2005. The agency's basis for denial was that the petitioner had \$81,670 in an excess asset, that being the annuity. The agency arrived at the \$81,670 figure by subtracting the 12 months of annuity payouts from the original \$100,000 divestment.
6. The petitioner submitted the annuity for sale to three appropriate financial companies. All three declined to purchase the annuity, citing the lack of a "period certain" for the annuity's payout. After being made aware of these three rejections, the agency concluded that the purchase of the annuity constituted an impermissible divestment of assets.

DISCUSSION

I. THE PETITIONER'S ANNUITY IS NOT AN EXCESS ASSET.

To be certified for Institutional MA, a person cannot have nonexempt assets in excess of \$2,000. Wis. Stat. §49.47(4)(b)3. If available assets are above that limit, the person is not eligible for MA. An asset is considered available if it can be sold or disposed of by the owner or the owner's representative, the owner has legal title to it, and the owner has the legal ability to make the money from the asset available for support and maintenance. *Medicaid Eligibility Handbook (MEH)*, 4.5.2.

The Department has developed a specific policy to assess the availability of annuities:

4.5.7.4 Annuities

An annuity is a written contract under which, in return for payment of a premium or premiums, an individual will receive a series of payments at regular intervals for a specified time period.

The annuitant is the person entitled to the payments. A purchaser can name himself/herself or another person as the annuitant. The purchaser may also name a beneficiary to receive annuity payments after the annuitant's death.

4.5.7.4.1 Annuities purchased after March 1, 2004

(For annuities purchased before March 1, 2004 refer to subsection 4.5.7.4.2)

Treat Annuities purchased after March 1, 2004 as available assets in accordance with the following:

Annuities that can be surrendered:

If the annuity's cash value is available for withdrawal (minus any penalty) the annuity can be "surrendered."

To determine the value of annuities that can be surrendered (for example, an annuity in the accumulation phase), use the following formula: ...

Annuities that cannot be surrendered.

Determine the value of annuities that cannot be surrendered (e.g. immediate annuities in the payout phase) as follows:

Formula deleted

...

Applicants/recipients who own annuities that **cannot be surrendered** will be provided an opportunity to prove that the annuity is unavailable. (Note: This does not apply to annuities that can be surrendered) The annuity will be considered to be an unavailable asset **only** if documentation is provided from at least three companies active in the market stating their unwillingness to purchase the annuity. Payments from an annuity that is considered to be unavailable must be counted as income. Annuities that are considered to be unavailable must also be evaluated for possible divestment, in accordance with (4.7.11).

The applicant/recipient may prove that the annuity has a fair market value lower than the initial value determined by the worker. The applicant/recipient must provide documented offers from at least three companies active in the market and do so within the regular timeframe. ...

To provide proof that the annuity is unavailable or has a fair market value lower than the initial value determined by the worker, the applicant must demonstrate that (s)he has made reasonable attempts to obtain a fair market price for the annuity contract or annuitized payments. The actual fair market value would be established by offering the annuity for sale in an "arms-length transaction" to at least three companies active in the annuities market.

(example deleted)

MEH, 4.5.7.4. See also in accord, the Department's BWP Operations Memo #04-03 (February 12, 2004). The Medicaid state statute and state code require the agency to consider non-exempt "actually available" assets in determining eligibility. Wis. Stat. §49.47; Wis. Admin. Code §HFS 103.06. However, neither of these authorities has a specific availability test tailored to annuities; only the *MEH* has this.

Before the petitioner presented the agency with the three letters establishing that the annuity could not be purchased, the denial on an "excess asset" theory was correct. However, the petitioner did present such letters to the agency. Although the agency argued at hearing that this annuity has a cash value, I accept the petitioner's construction of the annuity document for the purpose of determining that this annuity has

no cash value. Because the agency apparently also had a concern, after the letters were submitted, that the annuity might not be an available asset, the analysis then correctly turned to a discussion of whether or not the purchase of this annuity constituted a divestment. (audio transcript, minute 9, testimony of Faber). Indeed, the petitioner's hearing request to this office identified the hearing issue as whether or not a divestment occurred. I conclude that there is no disqualifying divestment *amount* here, though not for any of the reasons advanced by the petitioner's counsel.

II. DIVESTMENT.

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MEH*, 4.7.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *MEH*, 4.7.3. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently, \$5,096). *MA Handbook*, 4.7.5.

Through the years, there has been a significant level of activity involving annuities that looked like divestment. As a result, a statutory and code provision have been enacted in an effort to exclude from the divestment penalty those commercial annuities that did not cause the purchasing recipient to transfer assets for less than fair market value, while those annuities falling outside of the statutorily permitted definition continued to be viewed as divestments. The pertinent portion of the Wisconsin divestment statute reads as follows:

(4) IRREVOCABLE ANNUITIES, PROMISSORY NOTES AND SIMILAR TRANSFERS. (a) For the purposes of sub. (2), whenever a covered individual ... transfers assets to an irrevocable annuity ... in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

a. For an annuity ... that is not specified under subd. 1.b. or par. (am), the applicable federal rate required under section 1274(d) of the Internal Revenue Code, as defined in s. 71.01(6).

b. *For an annuity with a guaranteed life payment, the appropriate average of the applicable federal rates based on the expected length of the annuity minus 1.5%.*

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments ...

(am) Paragraph (a)1. does not apply to a variable annuity that is tied to a mutual fund that is registered with the federal securities and exchange commission.

(b) The amount of assets that is transferred for less than fair market value under par.(a) is the amount by which the transferred amount exceeds the expected value of the benefit.

(emphasis added)

Wis. Stat. §49.453(4)(a),(b). See also, Wis. Admin. Code §HFS 103.065(4)(at) (February, 2002).

The petitioner has made no showing in this record that the annuity contains the "federal rate" referenced in §49.453(4)(a)1a above, and did not argue the same. He also made no showing that the "applicable federal rates" based on the six-year life expectancy, minus 1.5 percent, were used to arrive at the

petitioner's monthly annuity payout amount. If the petitioner argues that six years is not the expected length because this annuity pays until the unknowable date that the petitioner dies, then there is no "expected length" for this annuity, and the annuity does not pass divestment muster under §49.453(4)(a)1b.

When statutes, rules, code, and Department policy, as expressed in the *MEH*, do not answer a question on an "SSI-Related" MA case, another authority that can be consulted is the *State Medicaid Manual (SMM)*, a policy document produced by the federal Department of Health and Human Services. Large sections of the *SMM* can be viewed online at <http://cms.hhs.gov/manuals/>. The *SMM* does not deal with the specific question presented here, other than to point out that an annuity that abusively shelters assets is a divestment vehicle:

3258.9 Treatment of Certain Kinds of Transfers for Less Than Fair Market Value. Certain financial transactions or purchases may constitute a transfer of assets for less than fair market value. Treat the following as described.

...

B. Annuities. – Section 1917(d)6 of the Act provides that the term "trust" includes an annuity to the extent and in such manner as the Secretary specifies. This subsection describes how annuities are treated under the trust/transfer provisions.

...The annuity may or may not include a remainder clause under which, if the annuitant dies, the contracting entity converts whatever is remaining in the annuity into a lump sum and pays it to a designated beneficiary.

Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound.

...

SMM, §3258.9B, pp. 3-3-109.15-.18.

Thus, there is nothing in the above authorities that causes me to conclude that the annuity was not a divestment vehicle. Of course, that conclusion does not end the matter. The petitioner is only disqualified from Institutional MA coverage for a period based on a divested amount. The penalty-provoking amount is the amount transferred in excess of the expected value of the benefit. Wis. Stat. §49.453(4)(b). This recipient will receive a benefit in the form of his monthly \$1,410 payments. If he lives for the expected six years from the purchase of the annuity, the expected value of the benefit becomes \$101,520.00 (72 months x \$1,410). When the \$101,520 expected value of the benefit is subtracted from the \$100,000 transferred amount, no amount remains to be used for a penalty period.

CONCLUSIONS OF LAW

1. The petitioner's annuity, which is irrevocable, has no cash value, and has been rejected for purchase by three appropriate buyers, is not an available asset for MA purposes.
2. The petitioner's purchase of the annuity was not a disqualifying divestment, solely because the \$101,520 expected value of the benefit was not exceeded by the \$100,000 transfer made to purchase that annuity.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to continue processing, within 10 days of the date of this Decision, the petitioner's Institutional MA application of June 20, 2005, in accord with the Conclusions of Law above. In all other respects, the petition herein is dismissed.

REQUEST FOR A NEW HEARING

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 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).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

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 5th day of
December, 2005

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