



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-23/82892

PRELIMINARY RECITALS

Pursuant to a petition filed February 14, 2007, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Green County Dept. of Human Services in regards to the denial of Medical Assistance (MA), a telephone hearing was held on April 9, 2007, at Monroe, Wisconsin. A hearing set for March 21, 2007, was rescheduled at the petitioner's request. A hearing set for April 6, 2007, was rescheduled at the county agency's request. At the request of both parties, the record was held open for 10 days for the submission of additional information.

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, by teleconference:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Scott Thompson, Attorney
P O Box 710
Monroe, WI 53566-0710

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: Lindy Trumpy, ESS
Green County Dept Of Human Services
N3152 State Road 81
Monroe, WI 53566

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is an institutionalized resident of Green County. Her spouse, (petitioner's spouse), lives in the community.
2. On or about November 20, 2006, the cash proceeds of a commercial, and apparently revocable, annuity were paid to the petitioner's community spouse in the form of a check for \$50,080.71.

3. On November 28, 2006, (petitioner's spouse) executed an irrevocable annuity as annuitant, with his adult children, (redacted) and (redacted), as grantors. He paid \$35,000 to his children, who in return agreed to pay him \$364.58 per month for 96 months or his death, whichever occurs first. Included in the contract was an agreement that (petitioner's spouse) would not sell, pledge or otherwise use the funds in the annuity. The annuity cannot be surrendered for a cash value. See, Exhibit #10.
4. The petitioner applied for Institutional - Medical Assistance on December 19, 2006, seeking MA retroactive to November 1, 2006.
5. On February 7, 2007, the county agency issued a Negative Notice to the petitioner informing her that her application for MA was denied because she had "Divested \$45,676.00 in November 2006. Ineligible for Medical Assistance for nursing home care through 5/31/07. Eligible for Card Services."
6. After a number of exchanges between petitioner's attorney and the county, on February 12, 2007, the county granted MA to the petitioner, effective in March, 2007, and de facto denied MA for the period of November, 2006 – February, 2007, because it took no action on this part of the application period.
7. On February 14, 2007, the petitioner filed an appeal with the Division of Hearings & Appeals seeking a review of the denial of MA.
8. On February 23, 2007, the county requested, per the MA Handbook, Appendix 4.5.7.4.1, that petitioner provide documentation from three companies stating their unwillingness to purchase the annuity by March 13, 2007.
9. On March 16, 2007, the petitioner's attorney sent a letter to the county agency informing it that the two adult children paid \$18,803 from the annuity principal to the petitioner's nursing home on or about February 26, 2007. Also attached were three letters indicating that Dave Mosher & Associates Insurance Services, Inc., Babler Associates Insurance & Financial Professionals, and Edward Jones Inc. of Monroe, Wisconsin, would purchase the (redacted) Irrevocable Annuity but cannot because paragraph D of the instrument prohibits its sale.
10. Thereafter, the county agency, per instruction from the Department, did not accept the letters because it was not clear that the companies were active in the annuity market.
11. On March 19, 2007, the county agency issued a Negative Notice to the petitioner informing her that her application for MA was denied because "...you have not provided verification that the irrevocable annuity established 11/28/06, is not unavailable."
12. At the fair hearing held on April 9, 2007, the county agency admitted that the Notice of February 7, 2007, was defective and had been reversed due to the then pending verification of potential annuity purchasers, and no other subsequent divestment determination has been made of case record.
13. The record was also held open for 10 days for the petitioner's attorney to produce documents that demonstrate that the \$18,803 paid to the nursing home came from the annuity principal. On April 11, 2007, the DHA received a copy of a January 19, 2007, bank statement showing that \$35,000 was deposited in Wisconsin Community Bank Checking Account #(redacted) on November 24, 2006, in an account held in the name of the "(redacted) Irrevocable Annuity"; and a second similar but not identical bank statement showing that Wisconsin Community Bank Checking Account #(redacted) had a balance on February 27, 2007, of \$15,787.52. See, Exhibit #15.
14. The record was held open for 10 days for the agency to produce letters from the three commercial entities approached by Attorney Thompson about purchasing the annuity, to the effect that these companies are not in the business of buying such annuities; but no further evidence has been received from the county.

DISCUSSION

The MA asset limit for an individual is \$2,000. Wis. Stat. § 49.47(4)(b)3m. If available assets are above that limit, the person is not eligible for MA. The statute does not allow for outstanding debts to be deducted from assets, nor does it provide any exceptions for unusual situations. 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. MA Handbook, Appendix 4.5.2.

Effective March 1, 2004, the Department instituted a new policy concerning annuities. 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. Handbook, App. 4.5.7.4.1.

The agency determined that the annuity in this case, valued at approximately \$35,000, was available. The determination was made because there was insufficient proof that the companies declining to purchase the annuities were actually "in the market," despite assertions from all three that they would be willing to purchase the annuities. The record was held open for 10 days for the county to prove this assertion by contacting the proffered purchasers to try to obtain statements from them that they do, or do not, buy such annuities in the regular course of their respective businesses. It has not done so.

In addition, the petitioner's attorney points out that if a divestment occurred, the petitioner has effectuated a partial cure to the tune of \$18,803 in late February, 2007, asserting that this would protect her interest in MA eligibility at least retroactive to February 1, 2007.

The petitioner produced a copy of a prior decision of the DHA in a similar dispute. While not bound by prior decisions of other DHA judges, in this instance I must concur with the analysis and decision of Administrative Law Judge Brian Schneider, i.e., that the annuity is not an available asset. Just as Judge Schneider found in the earlier Green County case, MED-23/65344 (Wis. Div. Hearings Appeals November 3, 2004)(DHFS), I also believe the agency is missing the point in this transaction. The stated reason that all three companies declined to purchase the annuity is the clause in the annuity contract prohibiting its sale. The agency proffered that there are several companies that do advertise the purchase of annuities, and none of the 3 provided are on that list of businesses. Even if petitioner went to one of those companies, the result would be the same because the annuity contract itself does not allow its sale.

The agency has not, as of the hearing, acted with a written negative notice to currently determine whether a divestment event occurred, so I make no determination on whether the annuity contract is a divestment.

CONCLUSIONS OF LAW

The annuity created by petitioner's wife and their son is not an available asset, retroactive to November 1, 2006, because no company that purchases annuities would purchase it.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to re-determine petitioner's MA eligibility retroactive to November 1, 2006, by re-classifying the annuity in question as an unavailable asset; and taking all actions necessary to review and re-determine her eligibility retroactive to that date, with notice. These actions shall be completed within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wisconsin Statutes § 227.49. 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, and 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 appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this 30th day of
April, 2007

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