



STATE OF WISCONSIN

In the Matter of

(petitioner)
c/o John F. Koenig, Attorney
Kohls & Associates LLC
5900 Monona Drive Suite 300
Madison, WI 53716

DECISION

MED-13/94132

The proposed decision of the hearing examiner dated August 18, 2008, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed May 30, 2008, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Dept. of Human Services in regards to the denial of Medical Assistance (MA), a hearing was held on July 16, 2008, at Madison, Wisconsin. A hearing set for June 19, 2008, was rescheduled at the petitioner's request.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o John F Koenig, Attorney
Kohls & Associates L L C
5900 Monona Drive Suite 300
Madison, WI 53716

Represented by:

John F. Koenig
5900 Monona Drive Suite 300
Madison, WI 53716

Respondent:

Wisconsin Department of Health and Family Services
1 West Wilson Street, Room 650
P.O. Box 7850
Madison, WI 53707-7850

By: Diane Hafner, Assistant Corporation Counsel

Dane County Dept Of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxx) is an institutionalized resident of Dane County. She applied for Medical Assistance on March 31, 2008, seeking MA coverage retroactive to March 1, 2008.
2. At application, the petitioner's representative provided proof that the petitioner's community spouse purchased a five year term single premium annuity policy on March 21, 2008. The couple paid \$110,000 for the annuity, and in turn the annuity would be payable to (redacted) in the amount of \$1,907.07 each month for the five year term. At the time of application, the annuity contract did not include a written endorsement that the contract was irrevocable and non-assignable, however payout started immediately in April, 2008, and the annuity had no cash surrender value by its terms. See, Exhibit #5, pp. 7 – 9.
3. Thereafter, the county agency had the annuity contract reviewed by (redacted) of the J.G. Wentworth Annuity Purchase Program. On May 20, 2008, (redacted) opined, in writing, that the Wentworth business would value such an annuity contract, i.e., purchase it if so inclined, for a lump sum of \$82,090.57. See, Exhibit #3.
4. The county agency issued a Negative Notice to the petitioner on May 21, 2008, informing her that her application for MA for the months of March, 2008, to the present, was denied because she was determined to be over the asset limit for long term care MA. See, Exhibit #7.
5. The county agency determined the petitioner's applicable asset limit was a total of \$106,400 (\$104,400 Institutional Spouse specific asset limit + \$2,000 general asset limit) under a prior application on December 11, 2007, at which time an asset assessment of the couple's assets was performed under law, and the petitioner's attorney conceded at the hearing that the asset limit so determined was correct and applicable to the March 31, 2008, application under spousal impoverishment rules and statutes.
6. The county agency determined that the petitioner had other countable, non-exempt assets, besides the annuity, that totaled \$93,979.13, and the petitioner's attorney stipulated to this as a fact at the hearing held on July 16, 2008.
7. In arriving at the denial determination of May 21, 2008, the county agency added the other countable assets, \$93,979.13, to the estimated fair market value of the annuity provided by Formica, \$82,090.57, and concluded that the petitioner's total countable, non-exempt assets were \$176,069.70 (\$93,979.13 + \$82,090.57 = \$176,069.70). The agency concluded that the petitioner's countable assets were in excess of the limit of \$106,400 applicable to him.
8. The petitioner filed an appeal with the Division of Hearings & Appeals on May 30, 2008, contesting the denial of institutional MA.
9. On or about July 8, 2008, the petitioner received a re-issued copy of the annuity contract that included an "ENDORSEMENT" that stated as follows:

This Contract may not be surrendered, transferred, collaterally assigned, or returned for a return of the premium paid. This Contract is irrevocable and has no cash surrender value. An Owner may not at any time amend this Contract or change any designation under this Contract.

The terms of this Endorsement take precedence over any terms of the Contract that are inconsistent with this Endorsement.

See, Exhibit #5, at p.9.

DISCUSSION

Institutional MA is a subprogram of Wisconsin's MA program that provides long term care coverage for individuals in nursing homes and similar facilities. As with most MA programs, coverage is effective in the month of application, with coverage being available for up to three months prior to the month of application, Wis. Stats. §§ 49.45(1)(b); 49.46(6)(d). Benefits may not be paid for any period during which the covered individual does not meet the program's eligibility requirements, Wis. Stats. §§ 49.45(1)(b); 49.46(6)(b). As with all public assistance programs, it is the applicant's responsibility to establish that he meets all of the requirements for eligibility, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it was petitioner's job to demonstrate that she qualified for the benefits for which she had applied.

"Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. § 49.455(1). Generally, no income of a community spouse is considered to be available for use by the other spouse during any month in which that other spouse is institutionalized. Wis. Stat. § 49.455(3).

The MCCA created *asset* eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (e.g., \$2,000 for a single person). (The MCCA also established a MMMNA/*income* allowance for the community spouse at a specified percentage of the federal poverty line. This income allowance is the amount of monthly income deemed necessary for the community spouse to live on.)

When initially determining whether an institutionalized spouse is MA eligible, county agencies review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Handbook (MEH)*, § 18.4.2. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the CSAS (i.e., an asset limit) to determine eligibility.

MEH, § 18.4.3 explains the asset eligibility determination process:

First, a (CSAS) is calculated as follows: (1) If the couple's total countable assets are \$208,800 or more, the CSAS is \$104,400; (2) If the couple's total countable assets are less than \$208,800 but greater than \$100,000, the CSAS is 1/2 of the total countable assets of the couple; and (3) if the total countable assets of the couple are \$100,000 or less, the CSAS is \$50,000. Wis. Stat. § 49.455(6)(b)3.

\$2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple (here, \$106,400). Generally, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

This case turns upon whether the county agency has correctly determined that the couple's recently purchase single premium annuity is a countable asset, and if so, is it as valued by the agency at \$82,090.57. If countable, the couple's assets total \$176,069.70. The applicable limit is \$106,400.00. If countable, she is not asset eligible. If not, their assets total 93,979.13, and she is asset eligible.

The Medicaid Eligibility Handbook states the following with respect to the treatment of annuities:

16.7.4 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.

16.7.4.1 Annuities purchased after March 1, 2004

(For annuities purchased before March 1, 2004 refer to subsection 16.7.4.2)

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

16.7.4.1.1 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:

1. Total deposits made to the annuity.
- Plus**
2. Earnings on the deposits not previously paid out.
- Minus**
3. Withdrawals and surrender costs charged for withdrawal.
- Equals**
4. Annuity's value

16.7.4.1.2 Annuities that cannot be surrendered

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

1. Total deposits made to the annuity.
- Plus**
- 2 Earnings on the deposits not previously paid out
- Minus**
3. Payouts
- Equals**
4. Annuity's Value

The original annuity and the amended annuity, both provide for the monthly payments to begin on April 27, 2008. Thus, this annuity is in the pay-out phase.

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.) 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 17.11 Annuities.

The MA Handbook allows an applicant/recipient to show that an annuity should be treated as an unavailable asset or that its fair market value is less than the county worker's valuation. This may be done with proof from three companies active in the market that they are unwilling to purchase the annuity or would do so at a lower amount.

It may be said that the MA Handbook is too generous in adopting this three-refusal test. It was intended to offer an end to a potentially endless search to find a market. It was not meant to force a county worker to conclude that an annuity is an unavailable asset when the worker has verified that there is in fact a secondary market to purchase the annuity. That is the case here. The County established that petitioner's annuity interest is saleable at a value of \$82,090.57. (This figure establishes the true market value, making it unnecessary for the County to approximate its value by following the examples given in the MA Handbook.) It was, therefore, correct to include this amount in the asset calculation done at the time of petitioner's institutionalization.

The general rule in the spousal impoverishment is that a community spouse's income is not to be attributed to the applicant/recipient spouse. Petitioner argues that creating the annuity as an available resource is tantamount to considering her spouse's income in determining her eligibility. I disagree. The market will purchase the annuity interest with a lump-sum payment. That would provide petitioner and her spouse with a cash asset. Because spousal impoverishment treats resources differently than income by including all of the couple's resources in the resource calculation regardless of how they are owned, the County was correct in including \$82,909.57 in petitioner's resource eligibility determination.

Finally, as a side-note to petitioner, had the annuity not been an available asset the county would have needed to consider if an impermissible divestment occurred, both at issue and four months later when an endorsement was added to the annuity in an attempt to make it none-saleable. Further, under the federal Deficit Reduction Act of 2005 changes that will be implemented in Wisconsin, this annuity will bar petitioner's eligibility for other reasons, principally that Medicaid is not named a remainder beneficiary.

CONCLUSIONS OF LAW

- 1) That the annuity purchased by the petitioner and her spouse is ~~not~~ a countable asset.
- 2) That the county agency correctly determined that the annuity was a countable asset in testing the petitioner's eligibility for institutional MA.

NOW, THEREFORE, it is

ORDERED

That the petition for review is dismissed.

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 rehearing. You may also ask for a rehearing 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 as "PARTIES IN INTEREST" in the proposed decision. 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 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing 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 a rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the 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, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other 'PARTIES IN INTEREST' named in the proposed decision. The process for Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this 8TH
day of DECEMBER, 2008.

S/MARK THOMAS
Mark Thomas, Deputy Secretary
Department of Health Services