



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of


c/o Attorney Brenda Haskins
Hill, Glowacki, Jaeger & Hughes, L L P
P O Box 3006
Madison, WI 53704

DECISION

MED-13/103827

PRELIMINARY RECITALS

Pursuant to a petition filed April 30, 2009, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Dane County Department of Human Services in regard to Medical Assistance, a hearing was held on July 23, 2009, at Madison, Wisconsin. At the request of petitioner, hearings set for May 20, 2009 and June 19, 2009 were rescheduled. At the request of the parties, the following briefing schedule was established: by August 27, 2009 an initial brief by Attorney Haskins; by September 17, 2009 a responsive brief by Attorney Hafner; and by October 1, 2009 a reply brief by Attorney Haskins. The parties timely submitted their briefs to the Division of Hearings and Appeals (DHA) with a copy sent to the other party.

The issue for determination is whether the county agency correctly denied the petitioner's March 16, 2009 Medical Assistance application, due to an alleged countable asset from an annuity resulting in total assets above the MA asset eligibility limits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:


c/o Attorney Brenda Haskins
Hill, Glowacki, Jaeger & Hughes, L L P
P O Box 3006
Madison, WI 53704

Petitioner's Representative:

Attorney Brenda R. Haskins
Hill, Glowacki, Jaeger & Hughes, L L P
P O Box 3006
2010 Eastwood Drive Suite 301
Madison, WI 53704

Respondent:

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

By: Attorney Dyann Hafner
Assistant Corporation Counsel
Office of the Corporation Counsel
1202 Northport Drive
Madison, WI 53704

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner, [REDACTED] is an 86 year old resident of Dane County who has resided in a nursing home since about 2008. The petitioner is married to [REDACTED] who resides in the community and is her community spouse.
2. On January 25, 2009, petitioner's husband transferred \$46,200.00 of marital and individual assets into an Employees Life Company Single Premium Immediate Annuity (ELCO annuity), policy # [REDACTED]. See Exhibits 2 and 4.
3. The petitioner applied for Institutional Medical Assistance on March 16, 2009 requesting MA coverage retroactive to January 1, 2009. See Exhibits 1 and 2.
4. At application, the petitioner's attorney provided proof that the petitioner's community spouse purchased a single premium annuity policy of \$46,200 with an effective date of January 25, 2009. The first payment of \$844.65 commenced on February 25, 2009 and would continue to pay at that rate for 4 years and 8 months or September 25, 2013. At the time of application, the annuity contract did include a written endorsement that the contract was irrevocable and non-assignable, and the annuity had no cash surrender value by its terms. See Exhibits 2, 4 and 19.
5. The annuity's payout period of 4 years and 8 months was within petitioner's husband's life expectancy.
6. The annuity's primary beneficiary was the petitioner. The secondary beneficiary was the State of Wisconsin for "correctly paid" MA benefits, which satisfied the requirements of 42 U.S.C. sec. 1396p(c)(1)(F). See Exhibit 4.
7. The annuity contract contained an endorsement which stated in pertinent part: "This contract is irrevocable. It may not be transferred, assigned, surrendered or commuted during Your lifetime. This contract has no cash or loan value. Neither the Annuitant nor the Beneficiary may be changed." See Exhibit 4.
8. At the time of application, petitioner provided three letters from companies in the business of purchasing annuities advising that they would not purchase the annuity in question because of the non-assignability and non-revocability features of the annuity contract. See Exhibit 5.
9. The county agency had the annuity contract reviewed by Katie Dougher of J.G. Wentworth Annuity Purchase Program. On April 15, 2009, Ms. Dougher issued a written opinion that the J.G. Wentworth business would value such an annuity contract at \$27,000 lump sum (53 monthly

payments of \$844.65 beginning 5/25/2009). However, that opinion also stated in pertinent part: "This opinion is not a commitment to the purchase of your client's annuity and is subject to underwriting requirements." See Exhibit 13. The "underwriting requirements" were a package of many separate documents (Henderson Trust) which needed to be completed before JGW began its underwriting process. See Exhibits 15-19.

10. J.G. Wentworth, a financial services firm that specialized in purchasing structured settlements, annuities, and life insurance policies, filed for bankruptcy during May, 2009 (one month after the April, 2009 annuity valuation indicated in Finding of Fact #9 above). See Exhibit 21.
11. The county agency issued to the petitioner an April 24, 2008 negative notice informing her that her March 16, 2009 MA application was denied because she was determined to be over the MA asset eligibility limit for MA long term care. See Exhibit 7.
12. The county agency determined based upon the March 16, 2009 application that the petitioner's applicable asset limit was a total of \$111,560 (\$109,560 Institutional Spouse specific asset limit + \$2,000 general asset limit) the couple's asset assessment. Petitioner's attorney agreed at the hearing that the asset limit so determined was correct and was applicable to the March 16, 2009, application under spousal impoverishment rules and statutes.
13. The county agency determined that the petitioner had other countable, non-exempt assets, besides the annuity, that totaled \$111,410.92, and the petitioner's attorney did not dispute such calculation.
14. In arriving at the denial determination of April 24, 2009, the county agency added the other countable assets, \$111,410.92, to the estimated fair market value of the annuity provided by J.G. Wentworth, \$27,000, and concluded that the petitioner's total countable, non-exempt assets were \$138,410.90 (\$111,410.92 + \$27,000 = \$138,410.90) as of January 1, 2009. The agency concluded that the petitioner's countable assets were in excess of the limit of \$111,560 applicable to her.
15. The petitioner filed an appeal with the Division of Hearings & Appeals on April 30, 2009, contesting the denial of institutional MA.
16. Subsequent to the January 25, 2009 purchase of the annuity by petitioner's husband, the Department issued a revision and modification to the Medicaid Eligibility Handbook (MEH) which prescribed different procedures regarding the treatment of annuities, but those changes were effective March 1, 2009 (after the instant annuity was purchased). See Exhibits 9-11.

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 \$219,120 or more, the CSAS is \$109,560; (2) If the couple's total countable assets are less than \$219,120 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, \$111,560). 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 January 25, 2009 purchase of a single premium annuity is a countable asset, and if so, is it as valued by the agency at \$27,000. If countable, the couple's assets total \$138,410.90. The applicable limit is \$111,560. If countable, she is not asset eligible. If not, their assets total \$111,410.92, and she is asset eligible.

Many of the same annuity asset issues have been addressed in a prior Final Departmental Decision in Case No. MED-13/94132. In part, Attorney Hafner has argued that the county agency is relying on that hearing decision. However, the facts in that case are distinguishable from the instant case, and the hearing decision in MED-13/93132 should not apply for three basic reasons: 1) in that case, the annuity contract did not include a written endorsement that the contract was irrevocable and non-assignable unlike the instant case; 2) in that case, the petitioner had not provided the three letters at the time of MA application unlike this case; and 3) in that case, the State was not a named remainder beneficiary unlike this case.

When the county agency sent its April 24, 2008 denial notice to the petitioner, that notice informed her that her March 16, 2009 MA application was denied because she was determined to be over the MA asset limit for her long term care. See Exhibit 7. The county further alleged that it had contacted JG Wentworth (JGW), and they made an offer to purchase the annuity for \$27,000. However, the facts established during the hearing indicate that while JGW did value the annuity at \$27,00, it did not make

any offer to purchase the annuity and in fact was not even commencing its extensive underwriting review of that annuity for possible purchase of that annuity. See Exhibits #15-#19.

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

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 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. The fair market value of the annuity will be established as the highest of the documented offers. An offer from someone not active in the market will be considered legitimate only if it meets or exceeds the three offers from companies active in the market.

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.

MEH 16.7.4.1.2

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.

Under this analysis, an annuity in payout phase is not counted as long as the applicant submitted three letters from companies active in the market indicating their unwillingness to purchase the particular annuity. In the instant case, petitioner's counsel, Attorney Haskins established that the petitioner's annuity was in payout phase and the petitioner provided letters from three companies indicating their unwillingness to purchase the annuity. See Exhibit 5. She argued that the annuity should be considered unavailable and should only be counted as income for petitioner's husband.

Attorney Hafner argued both that the MA Handbook was too generous in adopting this three-refusal test, that the applicable section should be the more restrictive, revised version of MEH 16.7.4.1.2, which was modified effective March 1, 2009 (prescribed different procedures than the earlier version). However, Attorney Haskins responded correctly that as petitioner purchased her annuity on January 25, 2009 (prior to the March 1, 2009 effective date of the revision of MEH 16.7.4.1.2, the applicable test must be based upon the MEH provision in effect when the transaction took place – the January 25, 2009 annuity purchase. Ms. Haskins also argued that the "three letters" rule was a long standing (about four year) procedure and policy of the department, and that if it changed that procedure as of March 1, 2009, the public is entitled to timely notice and is entitled to rely on the prior published MEH provisions until the effective date of the change. The county agency incorrectly applied the March 1, 2009 revisions retroactive to petitioner's January 25, 2009 annuity. See Appellant's brief, pages 6 -10.

The three-refusal test 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 not the case here, as the county was unable to establish with reliable evidence that any company would actually purchase the petitioner's annuity to make it an available asset for the petitioner.

Attorney Hafner asserted in her brief that the annuity purchased by [REDACTED] was a product devised by a financial industry to take advantage of the spousal impoverishment "loophole" protecting income of the community spouse from the cost of the institutionalized spouse's care. However, such issue has been addressed by some courts which have concluded that the value of an annuity should not be a countable asset for MA eligibility. An Ohio appeals court held that the purchase of an annuity (post-Deficit Reduction Act) by a community spouse is not an improper transfer of assets in Vieth v. Ohio Dept. of Job & Family Services (Ohio Ct. App., 10th Dist. No. 08 AP-635, July 30, 2009). That Court stated in part: "funds used to purchase an actuarially sound non-revocable, non-transferable commercial annuity for the sole benefit of the community spouse, are not countable assets for Medicaid eligibility purposes." In a recent "not precedential" decision, the United States Court of Appeals for the Third Circuit in Weatherbee v. Richman affirmed the district court's decision that the Pennsylvania Department of Welfare improperly denied Medicaid benefits by counting an otherwise complaint annuity as a resource and considering that annuity as a resource because of a secondary market is fundamentally flawed. Weatherbee v. Richman (D.C. W. Pa., 2009) 595 F. Supp.2d 607.

Ms. Hafner further explained in her brief that Dane County does not want to go through the hearing process for every such case where an annuity is purchased for the purpose of sheltering assets because there does appear to be a secondary market for all non-transferable annuities. However, the County was unable to establish that petitioner's annuity interest is saleable at a value of \$27,000 or at any other value. The county agency, thus, was unable to establish that it correctly included that \$27,000 annuity amount in the asset calculation done in regard to petitioner's asset eligibility for Institutional MA. On the other hand, Attorney Haskins argued persuasively that the county failed to establish that JG Wentworth or any other company would purchase the petitioner's annuity at any price to make it an available asset for the petitioner.

On the issue of whether there was any divestment in this case, transfer of funds between spouses is not a divestment for which there is any penalty. MEH 17.4.1. That section lists the Exceptions to the divestment rules and indicates that: "a divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions apply: MEH 17.4, #8, The institutionalized person or his/her community spouse divest a nonhomestead asset or asset to a Spouse. Moreover, [REDACTED] did in the annuity contract name the State of Wisconsin as a beneficiary. At [REDACTED]'s death, the State of Wisconsin will be paid back the amount of MA provided for his wife's care. Attorney Haskins argued correctly that regardless of the source of the funds used to purchase the January 25, 2009 annuity, it was not a divestment for which there is a penalty for [REDACTED] to purchase and title the annuity solely in his name. The county agency was unable to refute the petitioner's argument and establish that a divestment did occur. Accordingly, based upon the above, I conclude that the purchase of the January 25, 2009 single premium immediate annuity by petitioner's husband was not a divestment, and that the annuity in question is not a countable asset for purposes of determining petitioner's eligibility for Medical Assistance – Nursing Home Long Term Care under Wisconsin's Medicaid laws.

CONCLUSIONS OF LAW

- 1) That the annuity purchased by the petitioner and her spouse is not a countable asset based upon the applicable law and policy at that purchase.
- 2) That the county agency incorrectly determined that the annuity was a countable asset in testing the petitioner's asset eligibility for institutional MA.
- 3) The county agency incorrectly denied petitioner's March 16, 2009 MA application due to assets above the MA asset eligibility limits.

THEREFORE, it is

ORDERED

The matter is remanded to the county agency with instructions to approve petitioner's March 16, 2009 MA application retroactive to January 1, 2009, 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 Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

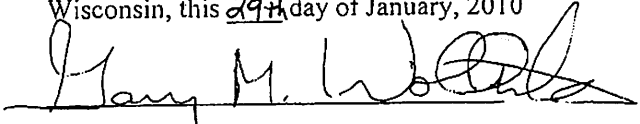
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health 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 651, Madison, Wisconsin 53703

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 Wis. Stat. §§ 227.52 and 227.53

THIS IS A CERTIFIED COPY OF THE
FINDINGS AND DECISION MADE IN THIS
MATTER AND FILED IN THE DIVISION OF
HEARINGS AND APPEALS IN THE CITY
OF MADISON, WISCONSIN.

Given under my hand at the City of Madison,
Wisconsin, this 29~~th~~ day of January, 2010



Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

- c: Suzanne Bach, DHS-Bureau Of Health Care Eligibility - email
Angela Dombrowicki, DHS/DHCAA Director - email
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