Annuity Not Available - No [redacted] need to name State

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDV-55/108137

PRELIMINARY RECITALS

Pursuant to a petition filed November 12, 2009, under Wis. Admin. Code § HA 3.03(1), to review a decision by the St. Croix County Department of Human Services in regard to Medical Assistance, a hearing was held on January 11, 2010, at New Richmond, Wisconsin. The record was left open for 18 days at the petitioner's request. The record was left open for 28 days at the petitioner's request.

The issue for determination is whether an annuity purchased by the petitioner and her late husband is a countable asset when determining her eligibility for institutional medical assistance and whether she must make the State of Wisconsin a residual beneficiary of that annuity.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Diane Peterson, ESS
St. Croix County Department of Human Services
1445 N. Fourth Street
New Richmond, WI 54017-1063

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted] resides in St. Croix County.

2. The petitioner applied for institutional medical assistance on August 3, 2009, and requested benefits retroactive to May 1, 2009.

3. The petitioner was in a nursing home from May 1, 2009, until October 3, 2009.

4. The petitioner and her late husband purchased an annuity from Protective Life Insurance Company on June 8, 2005, that made them co-annuitants. It cost $75,000 and pays $526.81 per month. It guaranteed payments for the latest of 11 years, the lifetime of the petitioner, or the lifetime of her husband. The owner cannot revoke, commute, or surrender it. It has no cash value. *Annuity Contract.*

5. The petitioner was born on July 29, 1924. Her husband was born on May 28, 1923.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed $2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Only assets actually available are considered. Wis. Adm. Code, § DHS 103.06(1). A person cannot reach this limit by divesting assets, which occurs if one "disposes of resources at less than fair market value." Wis. Adm. Code, § DHS 103.065(4)(a). If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b).

Special rules apply to annuities. If the annuity is unavailable, it must be counted as income. *Medicaid Eligibility Handbook*, § 16.7.4.1.1. It is considered a divestment to transfer funds to an irrevocable annuity in an amount that exceeds the value of the benefit, which occurs if the annuity pays out longer than the expected lifetimes of the annuitants. The amount of the divestment is obtained by "[a]dding together the amount of all the payments from the irrevocable annuity scheduled to be made after the month in which the primary annuitant's age or joint annuitants' ages exceed the estimated remaining years of life." Wis. Adm. Code, § DHS 103.065(4)(at). As of March 1, 2009, annuities that can be sold are considered available assets. *Medicaid Eligibility Handbook*, §16.7.4.1.2. The *Handbook* illustrates the difference between annuities that can and cannot be sold with following examples:

> Cynthia is 83 years old and applying for Medicaid. She owns an annuity purchased for $110,000 after March 1, 2004. The annuity is paying out and cannot be surrendered. It is irrevocable and non-transferable. The agency has the annuity contract reviewed by a company in the annuities market. The company provides the agency with a written statement that it would value Cynthia's annuity contract at $82,000. Cynthia's annuity is therefore considered to be an available asset with a value of $82,000 which is the amount used to determine Cynthia's Medicaid eligibility.
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> Sam is 66 years old and applying for Medicaid. He owns an annuity purchased for $110,000 after March 1, 2004. The annuity is paying out and cannot be surrendered. It is irrevocable and non-transferrable. It appears from the contract that it cannot be sold. The agency verifies this by having the annuity contract reviewed by a company in the annuities market. The company provides the agency with a written statement that it places no value on Sam's annuity contract. Sam's annuity is therefore considered to be an unavailable asset in determining his Medicaid eligibility.

Id.

The petitioner and her late husband purchased an annuity from Protective Life Insurance Company for $75,000 on June 8, 2005. It pays $526 per month. The county agency contends that the petitioner divested $30,635.44 after her husband died and she did not cash the annuity in. It also contends that she is ineligible because she did not designate the state as a residual beneficiary of the annuity. The agency

based its assertion that the petitioner could cash the annuity in from information provided by a representative of Protective Life. However, this information in inconsistent with the language of the annuity contract itself, and Sheryl Agricola, a representative of the company, later corrected its initial statement. *See letter from Sheryl Agricola to Petitioner,* December 29, 2009. The contract's language indicates that the petitioner was an annuitant on the policy from the time it was purchased and not just after her husband died. Any assertion, including those made by a representative of the company, that the annuity was transferred to the petitioner after her husband died contradicts the language of the contract itself and thus is wrong. In addition, the policy contract states:

> Notwithstanding any provision in the contact to the contrary, the contract is irrevocable and non-commutable by the owner. It is non-surrenderable and has no cash value.

Based upon this, I find that the annuity was never available as an asset to the petitioner.

The next question is whether the annuity's payments extend beyond the petitioner and her husband's life expectancy. The petitioner purchased the annuity just before she turned 81 and just after her husband had turned 82. At that time she had a life expectancy of approximately 8.5 years and her husband had a life expectancy of approximately 6.5 years. *Periodic Life Table.* http://www.ssa.gov/OACT/STATS/table4c6.html. However, because the contract does not end until the second person dies, what is relevant is the date on which the second spouse was expected to die. According to *IRS Publication 590,* where one spouse is 80 and the other is 82, this is 12.7 years; where one spouse is 81 and the other is 82, this is 13.1 years. Thus, the expected length of the annuity at the time of its sale was less than the combined life expectancy of petitioner and her husband. Because none of it would be paid after the combined life expectancy of the petitioner and her husband, there is no divestment under Wis. Adm. Code, § DHS 103.065(4)(at).

If an annuity is purchased, or if there has been a transaction as defined in s. 49.453(4)(ac), after February 8, 2006, the annuitant must make the State of Wisconsin of Wisconsin a remainder beneficiary within 30 days of applying for medical assistance or she will be ineligible for the program. Wis. Stat. § 49.47(4)(cr). Section 49.453(4)(ac) states:

> In this subsection, "transaction" means any action taken by an individual that changes the course of payments to be made under an annuity or the treatment of the income or principal of an annuity, including all of the following:
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> 1. An addition of principal.
> 2. An elective withdrawal.
> 3. A request to change the distribution of the annuity.
> 4. An election to annuitize the contract.
> 5. A change in ownership.

Because the annuity was purchased before February 8, 2006, the question is whether there has been a transaction concerning it since then. The annuity contract indicates that the petitioner's two children are each 50% beneficiaries of the annuity. After this contract was entered into it was discovered that the petitioner's son pilfered her assets to pay for gambling. (The petitioner's daughter submitted voluminous documentation of her brother's gambling activities.) Since February 2006 there has been documentation of an Edward Jones IRA that lists only the daughter as the beneficiary. It is unclear what role the IRA plays in this. Ms. Agricola wrote that Edward Jones is the sole beneficiary of the annuity, but this contradicts the language of the annuity. I must base my decision on the preponderance of the credible evidence, which is not crystal clear. The best I can tell is that the IRA holds the annuity. Although the language of the IRA may have changed, taken as a whole, the evidence lead me to conclude that there has been no transaction directly affecting the annuity since February 8, 2006. Therefore, the petitioner is not required to list the State of Wisconsin as a residual beneficiary on the annuity. I will remand this matter to

the agency with instructions to determine the petitioner's eligibility without considering the annuity as an asset. However, because it is not an available asset, it is income. Medical assistance rules require nursing home residents to "apply their available income toward the cost of their care." Wis. Adm. Code § DHS 103.07(1)(d). When the county agency determines her eligibility it must determine her share of her medical costs.

CONCLUSIONS OF LAW

1. The annuity the petitioner and her late husband purchased on June 8, 2005, is not an available asset.
2. The petitioner does not have to list the State of Wisconsin as a residual beneficiary on the annuity to receive institutional medical assistance.
3. The petitioner must contribute the income from the annuity toward the cost of her healthcare.

THEREFORE, it is ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it redetermine the petitioner's eligibility for institutional medical assistance from May 1, 2009, until October 3, 2009. When doing so it shall not consider the annuity purchased on June 8, 2005, an available asset but it shall consider it available income. In addition, the agency shall not require the petitioner to list the State of Wisconsin as a residual beneficiary on the annuity.

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.

Given under my hand at the City of Eau Claire,
Wisconsin, this 24th day of February, 2010

/sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals

c: [redacted]