



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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July 21, 2020



Attorney Jeff Mann
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

RE: [REDACTED]
Case No. FCP - 194790

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

Abigail Philipps
Legal Associate

- c: East Central IM Partnership - email
Office of Family Care Expansion - email
Health Care Access and Accountability - email
Attorney Jeanne Baivier - email



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION
Case #: FCP - 194790

The attached proposed decision of the hearing examiner dated October 25, 2019, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed on July 17, 2019, under Wis. Admin. Code § DHS 10.55, to review a decision by the Winnebago County Department of Human Services regarding Medical Assistance (MA), a hearing was held on September 5, 2019, by telephone.

The issue for determination is whether the agency correctly terminated petitioner's MA due to being over the asset limit.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Jeanne E. Baivier
Reff, Baivier, Lim, Muza, Sundet & Dunham S.c.
217 Ceape Ave
PO Box 1190
Oshkosh, WI 54903-1190

Respondent:

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

By: Attorney Jeff Mann, Winnebago County Corporation Counsel
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:
Kelly Cochran
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner ([REDACTED]) is a resident of Winnebago County and has been enrolled in MA.
2. On May 15, 2019 petitioner completed a renewal for MA. The renewal identified that petitioner had purchased an annuity from Nationwide for \$137,786.30 on March 25, 2019 with the State of Wisconsin named as the secondary beneficiary as of April 4, 2019. The annuity was funded by petitioner's IRA.
3. The annuity's owner is the petitioner, and the annuity's payee is petitioner's wife.
4. The annuity contains the following language in the non-assignment endorsement:

This Contract may not be transferred, assigned, sold, mortgaged, encumbered, surrendered or commuted. This Contract has no cash surrender value and is totally and permanently irrevocable after the Right to Examine and Cancel Period has expired. The Contract may not be pledged as collateral for a loan or as security for the performance of any obligation.
5. On July 22, 2019 the agency provided petitioner's annuity information to J.G. Wentworth.
6. On July 22, 2019 J.G. Wentworth issued a letter and Annuity Purchase Contract to the petitioner wherein J.G. Wentworth offered to purchase the remaining annuity payments for \$100,000.
7. The agency issued a notice to petitioner on June 3, 2019 advising him that his MA would end June 1, 2019 due to being over the asset limit.

DISCUSSION

The MA asset limit for an individual is \$2,000. Wis. Stat., §49.47(4)(b)3g. When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. See *Medicaid Eligibility Handbook (MEH)*, §18.4, et. seq, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. All available assets owned by the couple are to be considered and a Community Spouse Asset Share (CSAS) is determined. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the sum of the CSAS and \$2,000 to determine the institutionalized spouse's eligibility for MA.

The agency must consider whether certain assets are liquid and available. See *MEH* §§16.4,16.7. The agency in this case determined that petitioner's annuity was an available asset under *MEH* §16.7.4.1.2. That section of the policy manual states:

16.7.4.1.2 Annuities That Cannot Be Surrendered (Effective March 1, 2009)

It has been established that a market exists for annuities that cannot be surrendered. Some companies have purchased such annuities. Check the annuity contract to see if it can be

sold. If it is capable of being sold, consider it to be an available asset unless the applicant or member demonstrates that he or she has made reasonable attempts to obtain a fair market price by offering the annuity for sale to companies active in the annuities market.

If it appears that the annuity cannot be sold, verify this by having the annuity contract reviewed by a company active in the annuities market for an opinion of its value to the company. If the company documents an amount at which it values the annuity, that amount will be considered an available asset.

The annuity will be considered to be an unavailable asset if documentation is provided from the company stating that it places no value on 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 Section 17.11 Annuities.

Example 2: 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.

Example 3: 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-transferable. 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.

There was no dispute that petitioner's annuity cannot be surrendered. The annuity contract also states that it cannot be sold. Accordingly, the agency then sent the annuity information to a company active in the annuities market (here, J.G. Wentworth) for an opinion of its value to the company. J.G. Wentworth then issued a letter offering to purchase the remaining annuity payments for \$100,000. The agency then took this to mean that J.G. Wentworth had documented an amount at which it values the annuity, and that amount was considered to be an available asset.

The representative for J.G. Wentworth testified at hearing that J.G. Wentworth was offering to purchase the remaining payments and not the annuity policy itself. He also agreed that J.G. Wentworth was valuing the income stream from the payments and not the policy itself. He testified that he believed the offer to purchase could be made despite the non-assignability language because the policy allowed for changing the beneficiary of the income stream.

First, I do not find that J.G. Wentworth has documented that it has valued the annuity itself, rather it has offered to buy the remaining payments. Indeed, petitioner had two other financial service company representatives who credibly explained that they valued the policy as \$0 because of the non-assignability language. As also explained by one of the representatives, they would not purchase any such annuity because once it was purchased, there would be no guarantee that Nationwide would make any payment therefrom. Petitioner presented a letter from Nationwide stating that the policy had no liquidity value. Petitioner also cited to IRS Code regulation on individual retirement annuities which states:

(1)*Transferability.* The annuity or the endowment contract must not be transferable by the owner. An annuity or endowment contract is transferable if the owner can transfer any portion of his interest in the contract to any person other than the issuer thereof. Accordingly, such a contract is transferable if the owner can sell, assign, discount, or pledge as collateral for a loan or as security for the performance of an obligation or for any other purpose his interest in the contract to any person other than the issuer thereof. **On the other hand, a contract is not to be considered transferable merely because the contract contains: a provision permitting the individual to designate a beneficiary to receive the proceeds in the event of his death, a provision permitting the individual to elect a joint and survivor annuity, or other similar provisions.**

26 CFR §1.408-3(b)(1)(emphasis added). The emphasized language shows that the agency was mistaken in considering J.G. Wentworth's offer as valuation of the annuity; it could not make an offer to purchase the annuity because this type of annuity cannot be transferred.

While the annuity may not be treated as a resource, the payments from the annuity, of which [REDACTED] is both the owner and the annuitant, represent a financial instrument of value. Income streams from irrevocable annuities have come to acquire market value as financial institutions such as J.G. Wentworth have begun to purchase the rights to receive payments. Since SSI is a current needs program, all sources of available support that are not otherwise excluded are considered in determining eligibility. The SSI Program Operations Manual System (POMS) considers three factors in determining whether property is a resource: "Ownership Interest," "Legal Right to Access (Spend or Convert) Property," and "Legal Ability to Use For Personal Support and Maintenance." POMS SI 01110.110. In this case, [REDACTED] owns the income stream, he has the legal right to determine the recipient of the payments, and he therefore has the right to make the payments available for his personal support.

The agency has treated the present value of future payments as an available resource as long as there has been a market for income streams. The policy is not limited to annuities, but to any right to receive future payments that can be directed by Medicaid members. The agency cites DHA decisions MEH-13/94132 and MED-40/65357, both of which addressed payments from irrevocable annuities, in supporting the current treatment of income streams that are subject to offers of sale. Accordingly, the petitioner's annuity is not an available, countable resource, but to the extent that the petitioner may sell the right to receive future income from the annuity, the present value of those future payments is a resource under the Medicaid laws.

CONCLUSIONS OF LAW

The preponderance of the evidence does show that the agency correctly terminated petitioner's MA due to being over the asset limit.

THEREFORE, it is

ORDERED

That the petitioner's appeal shall be dismissed.

REQUEST FOR A REHEARING.

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be received within 20 days after the date of this decision. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, Madison, WI 53705-9100 and to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

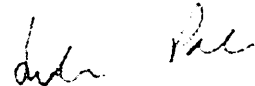
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court and served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, and on those identified in this decision as "PARTIES IN INTEREST" no more than 30 days after the date of this decision or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 21 day
of July, 2020.


Andrea Raim, Secretary-designee
Department of Health Services