State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO BOX 712
TRENTON NJ 08625-0712
TELEPHONE 1-800-356-1561

JON S. CORZINE
Governor

JENNIFER VELEZ
Commissioner

JOHN R. GUHL
Director

609-588-2656

CERTIFIED

April 29, 2009

John W. Callinan, Esq.
2052 Highway 23 Ste-103
Wall Twp, NJ 07719

Re: **FINAL AGENCY DECISION**
John Lott
OAL Dkt. No. HMA 3790-08N

Dear Counsel:

Enclosed is the Final Agency Decision rendered in the above-captioned matter.

If you are dissatisfied with the decision, you have the right to seek judicial review by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, P.O. Box 006, Trenton, New Jersey 08625. A request for judicial review must be initiated within 45 days from the date of receipt of the decision.

Any corrective action required by the decision will be promptly implemented by the appropriate agency staff.

Yours very truly,

Robert M. Liwacz, Esq.
Office of Legal and Regulatory
Liaison/DMAHS

c: Dianna Rosenheim, DAG
Donna Firca, FHL

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO BOX 712
TRENTON NJ 08625-0712
TELEPHONE 1-800-356-1561

JON S. CORZINE
Governor

JENNIFER VELEZ
Commissioner

JOHN R. GUHL
Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.L.,	
PETITIONER,	**ADMINISTRATIVE ACTION**
v.	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY BOARD OF SOCIAL SERVICES,	**OAL DKT. NO. HMA 3790-08**
RESPONDENTS.	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the OAL case file and the Initial Decision in this matter. Petitioner and Respondent filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is April 30, 2009 in accordance with an Order of Extension.

This matter arises from the purchase of an annuity in the amount of $249,688. Petitioner's spouse received $1,624.53 a month. Petitioner contends that since it is payable to the community spouse she does not need to liquidate the resource.

The Initial Decision, dated January 28, 2009, is largely premised on a Pennsylvania decision, James v. Richman, 547 F.3d 214 (3rd Cir. 2008), a case concerning Medicaid benefits applied for in September 2005. Since that date the Deficit Reduction Act of 2005 (DRA) was enacted and there were subsequent pronouncements from CMS regarding the treatment of annuities for the purposes of determining Medicaid eligibility. These changes were not addressed by the court in James but must be applied to the matter here.

Moreover, on February 26, 2009, New Jersey Superior Court, Appellate Division specifically rejected the James case as it was based on law prior to the enactment of the DRA or the subsequent publications from CMS. N.M. v. DMAHS and Monmouth County Board of Social Services, 405 N.J. Super. 353 (2009). The Appellate Division also found the Weatherby v. Richman matter, likewise cited in the Initial Decision, was not precedential and further noted that it failed to discuss the CMS publications that "specifically rejects" the argument that an annuity purchased for a community spouse cannot be counted as a resource.

Instead the Appellate Division found that under the DRA "a state may now consider the value of an annuity purchased for the sole benefit of the community spouse in determining whether the institutionalized spouse satisfies the resource limits for Medicaid eligibility." N.M. vs. DMAHS at 365.

Thus, I REVERSE the Initial Decision in so far as the annuity at issue must be considered in determining Petitioner's eligibility. The record before me indicates that at least one entity, Peachtree Settlement Funding, may purchase the annuity payments. The last sentence of the stipulation of facts states that "UCBOSS has not presented J.L. with the purchase contract to sign so it is unknown whether she would enter into such an assignment agreement." (ID at 4). I FIND this is a material issue of fact as Petitioner and his spouse must take steps necessary to liquidate an otherwise available resource. Chalmers v. Shalala, 23 F.3d 752 , 756 (C.A.3 N.J.),1994. The matter is hereby remanded to OAL to determine the effect of this annuity on Petitioner's eligibility.

THEREFORE, it is on this 28th day of APRIL 2009,

ORDERED:

That the Initial Decision in this matter is hereby REVERSED; and

That the matter is hereby REMANDED to the Office of Administrative Law for further findings regarding the availability and value of the annuity.

John R. Guhl, Director
Division of Medical Assistance
and Health Services

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. HMA 3790-08

J.L.,

Petitioner,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY BOARD OF SOCIAL SERVICES,

Respondents.

John W. Callinan, Esq., on behalf of petitioner

Dianna Rosenheim, Deputy Attorney General, on behalf of respondents (Anne Milgram, Attorney General of New Jersey)

Record Closed: January 5, 2009 Decided: January 28, 2009

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.L. appeals the denial by respondents Division of Medical Assistance and Health Services and Union County Board of Social Services (UCBSS or County) of his request for Medicaid nursing home benefits. The denial dated March 13, 2008, was

based on the County's determination that the petitioner's resources exceeded the community spouse's protected resource share of $106,400. On March 18, 2008, the petitioner requested a fair hearing, and the case was transmitted to the Office of Administrative Law, where it was filed on March 25, 2008. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was set on May 16, 2008, before the Honorable Imre Karaszegi, ALJ, but was adjourned at the request of petitioner's counsel. On June 27, 2008, the case was then scheduled to the undersigned, where after numerous adjournments, the parties agreed to submit a joint stipulation of facts by December 23, 2008, and briefs as cross-motions for summary decision by January 5, 2009, in lieu of a hearing. I concurred with counsel and on January 5, 2009, the record closed.

FACTUAL DISCUSSION

The parties stipulated to the following, which is **FOUND as FACT**:

1. J.L. entered a nursing facility on May 10, 2007. At that time he and his wife, P.L., had resources totaling $469,509.44.

2. On September 13, 2007, P.L. purchased a single premium immediate annuity from Lincoln Financial Group in the amount of $249,688, using funds withdrawn from her Fidelity Management 401(k) Plan. See annuity at Exhibit J-2. The withdrawal amount, according to the documentation, was $266,023. See Fidelity statement at Exhibit J-3. Said annuity will pay $1,624.53 per month to P.L. for 240 months. The State of New Jersey is named as the primary beneficiary of the policy up to the amount of benefits paid for J.L. The annuity, by its terms, is irrevocable, non-assignable, actuarially sound, and provides for payments in equal amounts.

3. On or about August 27, 2007, P.L. and her insurance agent Tom Kelly signed a Single Premium Immediate Annuity (SPIA) Amendatory Endorsement.

4. J.L. applied for Medicaid benefits, through his wife P.L., at the Union County Board of Social Services (also called the Division of Social Services) on September 28, 2007.

5. At the time of J.L.'s application for Medicaid benefits, UCBOSS evaluated J.L. and P.L.'s resources and found them to total $359,614. UCBOSS included P.L.'s annuity in the resource total. See Exhibit J-5.

6. On March 7, 2008, UCBOSS denied Medicaid eligibility for J.L. due to excess resources.

7. Thereafter, both P.L. and UCBOSS attempted to get values for the annuity payment stream. P.L.'s agent Tom Kelly contacted J.G. Wentworth who wrote a letter dated July 3, 2008 in which they stated that the annuity was a "qualified plan" and their company did not purchase such.

8. J.G. Wentworth has purchased annuity payment streams in the past.

9. Mr. Kelly further advises that he contacted Prosperity Partners, Novation Capital, and Peachtree and each declined to purchase or quote a price for the annuity in question.

10. Mr. Kelly states that factoring companies will not purchase qualified IRA annuities because of the tax consequences.

11. Nancy Moharter, UCBOSS employee involved in the review of this matter, contacted the same companies as Mr. Kelly in October of 2008 and found the following:

A. J.G. Wentworth was still unable to purchase the annuity because it was qualified.

B. John Clairmont of Prosperity Partners Inc., advised that his company was unable to purchase it.

C. Aaron Cornslua of Novation Capital advised that they were unable to purchase it due to the language in the annuity preventing an exchange.

D. On October 14, 2008, Peachtree Settlement Funding advised that they would have to enter into a contract with the company to purchase the payments and they cannot do that without the consent of the owner. Peachtree representative Lisa Lynch advised Ms. Moharter that the contract said they could sell but the endorsement appears to negate assignability and she is not sure if they could process a purchase. (UCBOSS has not presented J.L. with the purchase contract to sign so it is unknown whether she would enter into such an assignment agreement.)

LEGAL ANALYSIS

The Medicaid program is governed by a combination of state and federal law. Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 165 (1998). The purpose of the program is to provide medical assistance to persons "whose resources are determined to be inadequate to enable them to secure quality medical care at their own expense." N.J.S.A. 30:4D-2. Thus, Medicaid benefits are a source of last resort and are available only after the applicant's own resources are deemed insufficient. Ibid.

The financial eligibility determination is based upon the resources of the applicant. N.J.A.C. 10:71-4.1. In examining the resources of a married couple where one individual is receiving institutional care, the board of social services looks to the combined countable resources of the couple, which include all resources owned by either member of the couple individually or together. N.J.A.C. 10:71-4.8(a).

Addressing a nearly identical situation as that presented in this case, the Appellate Division has noted that considering the marketable value of an income stream from an annuity to be a resource "blurs the distinction between resource allocation and

income allocation under the federal Medicaid law." Estate of F.K. v. Div. of Med. Assistance and Health Servs., 374 N.J. Super. 126, 144 (App. Div. 2005). Conversely, to do otherwise, and allow an annuity, and its income stream, to be excluded from the Medicaid eligibility determination, is contrary to the purpose of the Medicaid program. See Mertz v. Houstoun, 155 F. Supp. 2d 415, 427 (D. Pa. 2001) (noting that annuities are used as a loophole to shield assets from the Medicaid eligibility determination).

Despite the fact that it is contrary to the purpose of the Medicaid program, the Mertz court held that "a couple may effectively convert countable resources into income of the community spouse which is not countable in determining Medicaid eligibility for the institutionalized spouse by purchasing an irrevocable actuarially sound commercial annuity for the sole benefit of the community spouse." Ibid. Quoting favorably from this decision, the F.K. court held that a New Jersey regulation using the community spouse resource allowance as a cap for the amount of funds a Medicaid applicant can use to purchase an annuity was inconsistent with Federal law. F.K., supra, 374 N.J. Super. at 146. This, decision, like Mertz, is premised on the idea that after the annuity is purchased, the purchaser no longer has an ownership interest in the funds and, consequently, the funds are no longer an available resource. (In the present matter, however, the UCBSS is not looking to establish the annuity itself as an available resource, but, instead, is looking to establish the funds received from the annuity—the income stream—as an available resource.)

In 1988, responding to a growing awareness of the plight of elderly spouses who were impoverished when the spouse upon whose income he or she relied was institutionalized (e.g., Schachner v. Perales, 648 N.E.2d 1321, 1322 (N.Y. 1995)), Congress enacted the Medicare Catastrophic Coverage Act (MCCA), 42 U.S.C.A. §1396r-5, as amended by Pub. L. No. 100-360, 102 Stat. 683 (1988). Before the MCCA nearly all of a couple's assets had to be depleted before either individual could be eligible for Medicaid, leaving the spouse to remain in the community essentially destitute. H.R. Rep. No. 105 (II), 100th Cong., 2d Sess. 65-68 (1988), reprinted in 1988 U.S.C.C.A.N. 803, 888-92. Moreover, all income, including Social Security or one's private pension, was diverted to pay for institutional costs.

The MCCA community spouse provisions were enacted to "end this pauperization by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available to them while their spouse is in a nursing home at Medicaid expense." 1988 U.S.C.C.A.N. at 888; see also Whitehouse v. Ives, 736 F. Supp. 368, 371 (D. Me. 1990) (request for relief from Medicaid eligibility rules rendered moot by MCCA).

> The goal of the MCCA was to ensure sufficient income and resources for the community spouse, while committing a fair share of their resources to the institutionalized spouse's care. To that end, the MCCA established a level of income and resources for the community spouse that is protected from inclusion when determining the institutionalized spouse's eligibility for Medicaid and which need not be spent down for the spouse's care.
>
> [A.K. v. Div. of Med. Assistance and Health Servs., 350 N.J. Super. 175, 179 (App. Div. 2002) (citations omitted).]

An applicant for the Medicaid Only program must meet financial eligibility requirements. N.J.A.C. 10:71-1.2(a). If the resources of the applicant and his spouse exceed $106,400, he is ineligible. N.J.A.C. 10:71-4.8(a). N.J.A.C. 10:71-4.1(b) defines a resource "as any real or personal property which is owned by the applicant [or his spouse] and which could be converted to cash to be used for [the applicant's] support and maintenance." Such a resource must be available to an individual. N.J.A.C. 10:71-4.1(c). A resource is available when "[t]he person has the right, authority, or power to liquidate real or personal property, or his or her share of it." N.J.A.C. 10:71-4.1(c)(1). The UCBSS denial in this case is based on the contention that the annuity purchased by J.L. and P.L. are an available resource that exceed the permitted threshold.

Petitioner contends that the annuity cannot be liquidated because it is unmarketable, in that neither the annuity contract nor the income stream it generates is assignable. Consequently, the annuity is not countable resource, but rather income. Moreover, the definition of income includes "payments received as an annuity." 42 U.S.C.A. § 1382a(a)(2)(B); see also N.J.A.C. 10:71-5.4(a)(3). Petitioner, therefore, argues that the income provided by the annuity is protected by the MCCA, which

provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C.A. § 1396r-5(b)(1).

The UCBSS counters that the annuity is a resource because, arguably, it may be sold on the secondary market, and, thus, converted to cash. Further, it is not specifically excluded as a resource by the regulations. N.J.A.C. 10:71-4.4(b). The UCBSS explains that while the annuity may also provide income, it must be first considered a resource because the couple has the right, power and authority to liquidate it and use it for the Medicaid applicant's care, and this is the first inquiry in the eligibility determination. The UCBSS maintains that an annuity should be viewed no differently than an investment vehicle such as shares of stock, a mutual fund or rental property, which would demand liquidation in order to meet resource limitation requirements to gain Medicaid eligibility.

Petitioner also maintains that the Deficit Reduction Act of 2005 (DRA), which supplemented the Omnibus Budget Reconciliation Act of 1993, permits a community spouse to shield resources by converting assets to income through the purchase of an annuity contract, so long as (1) the State is named as the first remainder beneficiary to the extent that the institutionalized spouse received Medicaid benefits, (2) the annuity is irrevocable and non-assignable, and (3) the annuity is actuarially sound. 42 U.S.C.A. § 1396p(c)(1)(F) and (G). The UCBSS refutes petitioner's contention and points to the language in the DRA which amended 42 U.S.C.A. § 1396p in providing:

> Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).
>
> [42 U.S.C.A. § 1396p(e)(4).]

And 42 U.S.C.A. § 1396p(e)(1) refers to "any interest the individual or community spouse has in an annuity . . . regardless of whether the annuity is irrevocable or is treated as an asset." The UCBSS argues that in enacting the DRA, Congress intended to halt people with resources from cheating the system to get free medical care from a

taxpayer-funded program for the poor by attempting to hide their assets in an annuity which will return the assets to them over time.

CURRENT CONTROLLING LAW

The United States Court of Appeals for the Third Circuit recently decided James v. Richman, 547 F.3d 214 (3d Cir. 2008). In James the circuit court held that payments from an annuity owned by the community spouse are income of the community spouse under 42 U.S.C. § 1396r-5[1] and that the State could not compel the community spouse to attempt to sell the income stream. The James court stated:

> Alternatively, the Department argues that Josephine James could create a new annuity, selling the right to an income stream that is equal to the income to which she is entitled from the existing annuity. Such a transaction would not, however, be a transfer of the existing annuity. It cannot therefore be used to support the treatment of the existing annuity as an available resource. Instead, the Department's position would treat the hypothetical proceeds from the creation of a new annuity as a currently available resource. There is no statutory basis for such a theory and, indeed, adopting it would tend to undermine the MCCA rule that "no income of the community spouse shall be deemed available to the institutional spouse." 42 U.S.C. § 1396r-5(b)(1). Under such a theory, there is no clear limit on the hypothetical transaction proceeds that could be treated assets, whether based on the sale of a future stream of payments tied to a fixed income retirement account, social security, or even a regular paycheck.
>
> [James, supra, 547 F.3d at 218-19.]

The Third Circuit based its decision on 42 U.S.C. § 1382a(a)(2)(B) (the provision of the Supplemental Security Income program that states that annuity payments are income),[2] and 42 U.S.C. § 1396a(a)(10)(C)(III) (which is known as the "single

[1] 42 U.S.C. § 1396r-5 was a section of the Medicaid Act added by the Medicare Catastrophic Coverage Act, commonly known as the MCCA. The purpose of the MCCA was to protect the community spouse's income for the community spouse and to add certain income and resource spousal impoverishment provisions to the Medical Act.

[2] See also 20 C.F.R. § 1121(a) and N.J.A.C. 10:71-5.4(a)(3).

methodology" statute, requiring the Medicaid program to use the same income and resource methodology as the Supplemental Security Income program), and 42 U.S.C. §1396r-5 (which is a section of the Medicaid Act that by its very terms supersedes all other provisions of the Medicaid Act, 42 U.S.C. § 1396r-5(a)(1)).

In short, based upon these sections, payments from an annuity are income of the community spouse that does not affect the eligibility of the institutionalized spouse. Also, the provisions of the Medicaid Act upon which the holding of the James court is based supersede all other provisions of the Medicaid Act. James is binding, valid, and controlling.

STANDARD FOR SUMMARY DECISION

Summary decision is available in the administrative court pursuant to N.J.A.C. 1:1-12.5. The regulation provides that summary decision is appropriate if

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [N.J.A.C. 1:1-12.5(b).]

The summary decision rule is substantially the same as the summary judgment rule under R. 4:46-2. See Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995) (which recognized that the summary decision standard in administrative proceedings is substantially similar to that of New Jersey Court Rule 4:46-2).

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), stated that a motion judge is required to consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Therefore, where a moving party demonstrates, by competent evidential material, that no genuine and material issue of fact exists, the court must grant the motion for summary judgment. Similarly, the rules governing administrative proceedings provide that summary decision may be granted if there is "no genuine issue of material fact and the moving party is entitled to prevail as a matter of law." Borough of Lincoln Park Bd. of Educ. v. Bd. of Educ. of Boonton, EDU 5944-02, Initial Decision (April 2, 2003), adopted, Comm'r (May 15, 2003), aff'd, St. Bd. (Nov. 5, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>. Under N.J.A.C. 1:1-12.5(b) the determination to grant summary decision should be based on the papers presented as well as any affidavits filed with the application. Ibid. Here the parties jointly requested summary decision.

I **CONCLUDE** that there are no genuine issues of material fact, and in accordance with the decision in the above-referenced James case, the petitioner's resources do not exceed the permissible limit for Medicaid eligibility.

Accordingly, Summary Decision is granted and it is **ORDERED** that the decision of the UCBSS denying Medicaid eligibility to J.L. be and is hereby **REVERSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, P.O. Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1-29-09
DATE

Walter M Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: January 29, 2009

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 30 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

EXHIBITS

Joint:

J-1 CCR

J-2 Single premium immediate annuity from Lincoln National Insurance Company

J-3 Fidelity Investments Retirement Savings Statement

J-4 DMAHS application for medical assistance dated September 28, 2007

J-5 CCR Report, County of Union, Division of Human Services dated March 7, 2007

J-6 UCBSS denial of Medicaid eligibility dated March 7, 2007

J-7 Correspondence from J.G. Wentworth to Thomas Kelly dated July 3, 2008

J-8 Correspondence from J.G. Wentworth to DMAHS dated June 30, 2008

J-9 Correspondence from Prosperity Partners, Inc., to Nancy Moharter, UCBSS, dated October 4, 2008, and hand-written notes by Moharter