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 DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
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 JOHN R. GUHL
Director

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

E.F.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 7536-08
	:	
AND HEALTH SERVICES AND	:	
	:	
UNION COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
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 May 28, 2009 in accordance with an Order of Extension.

This matter arises from the purchase of an annuity in the amount of \$153,000. Petitioner's spouse received \$2,232.19 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 The Appellate Division also found the Weatherby v. Richman matter, likewise cited in the Initial Decision, was not precedential and further noted that it failed to discuss the CMS publications that "specifically reject" the argument that an annuity purchased for a community spouse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.

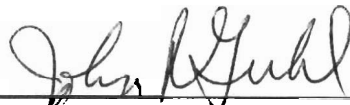
Thus, I REVERSE the Initial Decision in so far as the annuity at issue must be considered in determining Petitioner's eligibility. The record before me indicates that at least one entity, Peachtree Settlement Funding, may purchase the annuity payments. In exceptions, Petitioner's counsel states "if Lincoln objects to the change of ownership" Peachtree "may not [be] able to complete the transaction." There is nothing in the record that Lincoln has objected to the change of ownership. 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 27th day of MAY 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