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DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

ESTATE OF F.L.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 13756-08
	:	
& HEALTH SERVICES &	:	ON REMAND FROM
	:	
UNION COUNTY BOARD OF	:	OAL DKT. NO. HMA 7278-07
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

J.S.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 3249-08
	:	
& HEALTH SERVICES &	:	OAL DKT. NO. HMA 13756-08
	:	
UNION COUNTY BOARD OF	:	ON REMAND FROM
	:	
SOCIAL SERVICES,	:	OAL DKT. NO. HMA 7278-07
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the motions filed below.¹ Both parties filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is January 19, 2009, in accordance with an Order of Extension.

The ALJ found that summary decision was proper in this matter in that Petitioners "are not obligated to request that certain provision of their annuity contract be amended so as to facilitate the sale of the contracts or the stream of income from the contract on the secondary market." However, in a prior motion for summary decision by Petitioners, the ALJ determined that "it was not clear that the payee could not be changed" and the resulting change would enable the income stream to be sold. (ID at 2). Rather than showing that the payee could not be changed, Petitioners now claim that there is no requirement to request such a change.

The Initial Decision states that "[n]o legal authority has been advanced in support of the position that an applicant under these circumstances must make a request to the insurance company to change the terms of annuity contract or to take some other action to allow for liquidation of the annuity." Such a finding ignores that applicants must take affirmative steps to liquidate other assets. For example, they are required to request that lost or destroyed stock certificates or life insurance policies be reissued, bring suit to quiet title on a property so that it can be sold, and pay taxes and penalties on retirement funds.

¹ By letter dated January 8, 2010, the Deputy Attorney General advised that J.S. had been found eligible as of June 1, 2007.

In Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 712 A.2d 188, 198 (N.J. 1998), the New Jersey Supreme Court held that an applicant arguing that an asset is an unavailable resource has the burden of proving its unavailability. See also, Brewer v. Schalansky, 278 Kan. 734, 102 P.3d 1145, 1153 (Kan. 2004); In re DiCecco, 173 Misc. 2d 692, 661 N.Y.S.2d 943, 945 (N.Y. Sup. Ct. 1997); Dempsey v. Dep't of Pub. Welfare, 756 A.2d 90, 95 (Pa. Commw. Ct. 2000). The Initial Decision states there is a question regarding whether the payee can be changed. It is that issue that controls this case.

The Deficit Reduction Act of 2005 does not cause an annuity to be removed from the resource determination if it meets certain criteria. The criteria found at 42 U.S.C.A. § 1396p(c)(1) only deal with whether the annuity is subject to a transfer penalty. Nothing in that section prevents the annuity from being considered in the eligibility determination. To address this distinction, the August 6, 2007 CMS guidance relied on by Petitioner is clear – "an annuity should be assessed as a countable resource, with the resource value based on the amount the purchaser would receive if the annuity was cancelled, or the amount the annuity could be sold for on the secondary market if the annuity is assignable." (Attachment to Petitioners' Response dated October 9, 2009).

Case law supports the proposition that an applicant must take steps to obtain resources. The Appellate Division found that a surviving spouse must seek to elect against their deceased spouse's estate rather than accept a will that keeps assets out of reach. I.G. v. DMAHS, 386 N.J. Super. 282 (App. Div. 2006). In such a matter a surviving spouse is precluded from arguing that there is no obligation to challenge the testamentary trust which restricts or precludes using the funds for the surviving spouse's benefit. Similarly, Petitioners' decision

to request and place restrictions on the annuity likewise confers an obligation to request that such restrictions be lifted.

The Third Circuit has gone so far to hold that an applicant file litigation and "bring an action to partition the property [at issue]" Chalmers v. Shalala, 23 E.3d 752 , 755 (C.A.3 N.J.),1994 (emphasis added). The court concluded that the fact that Chalmers had the legal right to liquidate her interest in the inherited property qualifies it as a resource under SSI regulations.

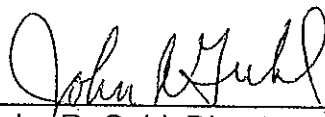
In Tannler v. DHSS, 211 Wis. 2d 179, 564 N.W.2d 735 (1997) the court noted the practical effect of the widow's inaction "is that persons other than the community spouse or the institutionalized spouse will receive the financial benefits of the conscious act to reject her share of estate. The result will be that the taxpayers of this state will bear the burden of supporting Tannler while she resides in the nursing home and receives Medical assistance. If Tannler had not rejected her share of her spouse's estate, then those assets would have been available to provide for her maintenance and health care without burdening the taxpayers." Id. at 190-191. See similar determinations in Matter of Estate of Dionisio v. Westchester County Dept. of Social Servs., 244 App. Div. 2d 483, 665 N.Y.S.2d 904 (1997), leave to appeal denied, 91 N.Y.2d 810 (1998) (Widow's waiver of her marital rights to a portion of her husband's estate was a transfer of resources for purpose of qualifying for medical assistance.); Matter of Mattei, 169 Misc. 2d 989, 647 N.Y.S.2d 415 (1996) (No functional difference between renunciation of inheritance and non-exercise of right of spousal election because both are rights of inheritance and assets for Medicaid purposes.)

Thus, a hearing must be held to resolve the factual dispute on whether Petitioners -regardless of whether they are willing to do so – can change the payee or otherwise make these annuities accessible. I hereby REMAND this matter to OAL for further proceedings.

THEREFORE, it is on this 19th day of JANUARY 2010

ORDERED:

That the Initial Decision is hereby is REMANDED for further proceedings as set forth above.



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