State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

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A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on OCT 21 2009

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
CONSOLIDATED
OAL DKT. NO. HMA 13756-08

ESTATE OF F.L.,
Petitioner,
v.
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY BOARD OF SOCIAL SERVICES,
Respondent,

ON REMAND
OAL DKT. NO. HMA 7278-07

J.S.,
Petitioner,
v.
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY BOARD OF SOCIAL SERVICES,
Respondent.

OAL DKT. NO. HMA 3249-08

Eugene Rosner, Esq., for petitioners (Fink, Rosner, Ershow-Levenberg, LLC, attorneys)

Dianna Rosenheim, Deputy Attorney General, for respondent Division of Medical Assistance and Health Services (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: October 14, 2009 Decided: October 20, 2009

BEFORE **JOSEPH A. PAONE**, ALJ:

Petitioners Estate of F.L. (F.L.) and J.S. had each appealed the denial of Medicaid eligibility by respondent Union County Board of Social Services (UCBSS). The UCBSS contended that the annuity purchased by the community spouse in both cases constituted a countable resource, and, therefore, the community spouse possessed assets in excess of the amount permitted under the "community spouse resource rule." F.L.'s contested case was transmitted for a hearing by the Division of Medical Assistance and Health Services to the Office of Administrative Law on July 2, 2007, and J.S.'s case on February 28, 2008. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On August 21, 2008, both cases were consolidated.

I have previously denied three separate applications for summary decision. The first motion was denied because I determined that whether an annuity is denominated as income or a resource (rendering petitioner ineligible for Medicaid) is dependent upon whether the annuity can be sold and converted to cash. Petitioners then renewed their motion after the decisions in James v. Richman, 547 F.3d 214 (3rd Cir. 2008) and Weatherbee v. Richman, 595 F. Supp. 2d 607 (W.D.Pa 2009). But I again denied the motion, relying on the recently reported Appellate Division decision in N.M. v. Division of Medical Assistance and Health Services, 405 N.J. Super 353 (App.Div. 2009), which had essentially distinguished James and viewed Weatherbee as "not precedential." Petitioners then moved a third time for summary decision on the grounds that if the payee cannot be changed, the annuity cannot be considered a countable resource. Because it was not clear that the payee could not be changed, I again denied summary decision. Now petitioner moves for summary decision on the basis that petitioners are not obligated to request that certain provisions of their annuity contract be amended so

as to facilitate the sale of the contracts or the stream of income from the contracts on the secondary market. Respondent's brief was received on September 25, 2009, and petitioners' brief was received on October 14, 2009, on which date the record closed.

The parties had previously stipulated that endorsements to both annuities made them irrevocable and prohibited their transfer, surrender or assignment. Since their last motion, petitioners no longer admit that the F.L. and J.S. annuities have value in the secondary market, and respondent has since conceded that unless a change were made to the terms of the annuities, they could not be sold. Consequently, since the annuities haven't any value in their present form in the secondary market, they are unavailable resources.

Respondent contends that petitioners must cooperate in the investigation and liquidation of their resources. Specifically, petitioners must request that the insurance companies, from whom they purchased the annuities, allow changes to the annuity contract in order that petitioners may liquidate the payment stream. Since petitioners refuse to do so, the UCBSS must count the annuity as a resource, and their eligibility must be denied because each annuity results in each petitioner exceeding her Community Spouse Resource Allowance (CSRA). Respondent argues that a Medicaid applicant "cannot refuse to sell [her] second home, or be uncooperative with the real estate agent by refusing to show the home to prospective buyers . . . [or] refuse to sign papers to sell stock or other investments in excess of the CSRA, and still obtain eligibility." Respondent adds that "non-liquid resources may be excluded from the resource consideration subject to the establishment of a plan of liquidation," but such exclusion is subject to the continuing cooperation of the applicant in the execution of the plan. Moreover, the applicant must "assist the [UCBSS] in securing evidence that corroborates her statements." N.J.A.C. 10:71-2.2(d)(2).

Petitioners respond that they, indeed, did cooperate fully with the UCBSS. They provided copies of "the annuity contracts as well as letters from the issuing insurance companies that interpret the terms of the contracts . . . ." Accordingly, since there is no remaining information to be provided, they have complied with N.J.A.C. 10:71-2.2.

Petitioners also explain that "the annuity contracts, by their terms, cannot be revoked, transferred, surrendered nor assigned." and, therefore, the annuities cannot be liquidated or the income stream sold. When an applicant has no "right, authority, or power to liquidate real or personal property," the resource is unavailable. N.J.A.C. 10:71-4.1(c)(1). Petitioners contend, therefore, that since in their present form, "the contracts have no buyers on the secondary market," as respondent apparently concedes, the annuities constitute unavailable resources and can never be considered in determining Medicaid eligibility.

Petitioners further contend that respondent's reliance on N.J.A.C. 10:71-4.4(b)(6) is misplaced. Petitioners criticize the analogy to real estate owned by an applicant or community spouse. They suggest that while the owner of real estate has the "right, authority or power to liquate" the property, he cannot readily do so. Whereas the facts here reveal that the annuitant does not have such right, authority or power to liquidate the annuity. N.J.A.C. 10:71-4.4(b)(6) provides that "the value of resources which are not accessible to an individual through no fault of his or her own," are merely considered inaccessible, and are not to be considered in the determination of eligibility, but are to "be reevaluated (regarding their accessibility) at every redetermination." While petitioners agree that an applicant must cooperate to liquidate an inaccessible resource, that requirement cannot be extended to an unavailable resource, such as the annuities in this case.

"Any resource which is not specifically excludable under the provision of N.J.A.C. 10:71-4.4 shall be considered a countable resource for the purpose of determining Medicaid Only eligibility." N.J.A.C. 10:71-4.2(a). And N.J.A.C. 10:71-4.4 does not exclude the subject annuities from consideration as a resource. Therefore, but for N.J.A.C. 10:71-4.1(c)(1), the annuities would be considered countable resources. However, pursuant to N.J.A.C. 10:71-4.1(c)(1), the annuities aren't presently countable because by their very terms they cannot be liquidated. No 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 an annuity contract or

take some other action to allow for liquidation of the annuity. So, therefore, I must **CONCLUDE** that petitioners have no such obligation.

Accordingly, I hereby **ORDER** that petitioners' motion for summary decision is **GRANTED** and the denial of Medicaid eligibility to petitioners F.L. and J.S. is **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 (45) 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 (7) 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.

October 20, 2009

DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency: October 20, 2009

Date Mailed to Parties: OCT 21 2009

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DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE