



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

PO Box 712

TRENTON, NJ 08625-0712

CHRIS CHRISTIE

Governor

KIM GUADAGNO

Lt. Governor

609-588-2656

JENNIFER VELEZ

Commissioner

VALERIE HARR

Director

January 31, 2014

Linda Ershow-Levenberg, Esq.
Fink Rosner Ershow-Levenberg, LLC
1093 Raritan Road
Clark, NJ 07066

Re: **FINAL AGENCY DECISION**

Mary Willow

OAL Dkt. No. HMA 2998-13

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.

Yours very truly,

Meredith Van Pelt, Esq.

Office of Legal and Regulatory

Liaison/DMAHS

MVP:go
Enclosure

C: Donna Firca, Esq.
Brian Trelease, Esq.



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

M.W.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
V.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 2998-2013
	:	
AND HEALTH SERVICES &	:	
	:	
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 matter, consisting of the Initial Decision, the documents in evidence and the contents of the OAL case file. Both parties filed exceptions in this matter. Procedurally, the time period for the Agency Head to

render a Final Agency Decision is January 30, 2014, in accordance with an Order of Extension.¹

This case concerns denial of Petitioner's November 2012 application due to excess resources. At issue is an \$80,010.58 annuity purchased from the Croatian Fraternal Union of America in September 2012. That annuity pays Petitioner \$7,280.97 a month. Petitioner also receives \$1,373.90 in Social Security benefits and \$688 from a private pension for a total of monthly income of \$9,342.87. Petitioner also gifted \$43,190.53 to her son in August 2012. This pattern of purchasing an annuity to pay for the cost of an individual's care while being subject to a transfer penalty is a large loophole that seeks to establish eligibility at taxpayer's expense and protect what can be substantial assets that would have otherwise been used to pay for care.² There is no doubt that these funds used to purchase the annuity contract were available to Petitioner prior to the conversion into an annuity contract. She now seeks to have them excluded as a resource and to have the transfer not subject to a penalty. In essence the \$80,010.58 has been transferred from an available resource through Petitioner's actions solely to qualify for Medicaid benefits. It is this legal theory and a novel reading of N.J.A.C. 10:71-4.4 with the overarching policy that Medicaid be the payor of last resort that led Union County to deny Petitioner's application.

¹ This matter was subject to three Orders of Extensions. After the first one was requested both parties stated that they had not received the Initial Decision. Additional time was granted to permit the filing of exceptions and a second extension was sought. During the review it became apparent that the OAL case file did not contain the post-hearing submissions by the parties. By letter dated December 11, 2013, the parties were instructed to provide those submissions.

² Congress sought to stop this type of scheme in the Deficit Reduction Act of 2005. "[W]hen signing into law the Deficit Reduction Act of 2005, President George W. Bush stated that the act "'tightens the loopholes that allowed people to game the system by transferring assets to their children so they can qualify for Medicaid benefits.'" (quoting Reif, A Penny Saved Can Be A Penalty Earned: Nursing Homes, Medicaid Planning, The Deficit Reduction Act of 2005, And The Problem of Transferring Assets, 34 NYU Review of Law & Social Change 339, 347 (2010).

I must note that annuities like the one at issue here were converted to cash in numerous cases. N.M. v. DMAHS 405 N.J. Super. 353 (2009). It cannot be said that case law is settled regarding the annuity in question as each annuity must be reviewed independently. Indeed the Third Circuit case law cited by Petitioner predates recent annuity cases in New Jersey where the annuity was an available resource. See H.P. v. DMAHS and Monmouth County Board of Social Services, OAL DKT. NO. HMA 414-07 (decided October 22, 2009) (couple purchased annuity contract worth \$279,000 and received an offer to purchase the contract's value); M.V. v. DMAHS and Monmouth County Board of Social Services, OAL DKT. NO. HMA 10357-07 (decided August 3, 2010) (applicant received offer to purchase the \$197,000 annuity contract which stated the "anti-assignment endorsement [in the annuity]. . . is not an impediment to...[the] purchase of the annuity payments."); and L.G. v. Monmouth County Board of Social Services and Division of Medical Assistance and Health Services, OAL DKT. NO. HMA 411-07 (decided October 22, 2009) (applicant was able to convert a \$300,000 annuity contract to cash). It appears that the secondary market will not convert Petitioner's annuity to cash. Thus, Union County analyzed the annuity under N.J.A.C. 10:71-4.4(b)(6) which excludes assets which are inaccessible through no fault of the individual and determined that since Petitioner made the \$80,010.58 "inaccessible" by her own action, those funds were accessible.

When reading 42 U.S.C.A. § 1396p(e)(4), which permits the states to consider annuities as countable resources, with the Supplemental Security

Insurance (SSI) guidance, Union County's position finds support.³ Similar but more informal arrangements where assets are transferred to a fiduciary under the guise of a promissory note have been determined to be available resources for purposes of Medicaid. E.g., Sable v. Velez, No. 10--4647 (3rd Cir. July 12, 2011), Wesner v. Velez, 2010 169674 (D.N.J. 2010), F.P. v. DMAHS and Ocean County, OAL DKT. NO. HMA 2081-10, A.W. v. DMAHS and Union County, OAL DKT. NO. HMA 9286-09. Petitioner is engaging in legal and financial gamesmanship in order to make herself Medicaid eligible, by having someone else hold funds that could be used for her care and arguing they are excluded from the resource eligibility determination. By purchasing an annuity, the informal promissory note scheme is given a patina of authenticity.⁴

When looking at the interplay of the federal statute, the SSI rules and the Congress' clearly stated rationale to prevent such obvious loopholes, excluding Petitioner's annuity as a countable resource is not as clear as Petitioner argues. Congress has allowed annuities to be treated as trusts to the extent the Secretary specifies. 42 U.S.C. § 1396p(d)(6). While, to date, the Secretary has not spoken on this, SSI rules have. Under SSI, annuities can be treated as a trust and therefore an available resource:

G. Policy—Legal Instrument Or Device Similar To A Trust

1. What Is a Legal Instrument or Device?

Consider under trust rules a legal instrument, device, or arrangement, which may not be called a trust under State law, but which is similar to a trust. We will consider such an instrument, device or arrangement as a trust if:

- it involves a grantor (see SI 01120.200B.2.) who transfers property (or whose property is transferred by another);

³ New Jersey is considered an SSI state, which means that the State's methodology for determining an individual's income and resources can be no more restrictive than SSI. 42 U.S.C.A. § 1396a(a)(10)(C)(i)(III).

⁴ The broker who arranged the annuity purchase uses the email info@medicaidannuity.com, indicating that the purpose behind this annuity is Medicaid eligibility. J-8.

- the property is transferred to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section); and
- the grantor transfers the assets to be held, managed or administered by the individual or entity for the benefit of the grantor or others.

However, we will not consider these arrangements under trust rules if they would be counted as resources under regular SSI resource-counting rules.

2. Examples of a Legal Instrument or Device

A legal instrument or device similar to a trust can include (but is not limited to):

- escrow accounts;
- investment accounts;
- conservatorship accounts (SI 01140.215);
- pension funds (SI 01120.210);
- **annuities;**
- certain Uniform Transfers to Minors Act (UTMA) accounts; and
- other similar devices managed by an individual or entity with fiduciary obligations.

SI 01120.201 (Emphasis added).

When a legal instrument such as an annuity is looked at under this provision, the fact that it "cannot be converted to cash" is of no moment. Trust rules under both SSI and Medicaid do not look for "liquidation" in order to be countable. Rather "an irrevocable trust established with the assets of an individual is a resource" when "payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1. in this section), the portion of the trust from which payment could be made that is attributable to the individual is a resource." SI 01120.201D.2.a. The POMS offers an example of a trust that can pay \$50,000 "to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire \$50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource." In this example the \$50,000 cannot be converted to cash or liquidated but rather could be paid under

some circumstance. Thus, the power to liquidate a resource is not always the hallmark of whether an asset is counted for Medicaid eligibility purposes.

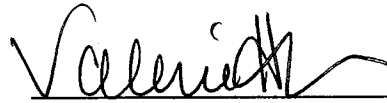
Rather than clear harmony between SSI and Medicaid annuity rules as proffered by Petitioner, the SSI rules support an analysis that the "Medicaid" annuities purchased just prior to applying for benefits would be considered available resources. It is under this posture that DMAHS successfully argued that promissory notes – an annuity's informal counterpart – are trust-like devices and resources under Medicaid eligibility. Unfortunately, this provision of the SSI rules which must be followed in SSI states has not found traction in other states which sought to close the annuity loophole. As such I am constrained to ADOPT the Initial Decision finding that Petitioner's annuity cannot be considered a countable resource at this time.

Finally, the Initial Decision found that Petitioner had not argued "the three-prong test" for attorney fees pursuant to 42 U.S.C.A. § 1988. In exceptions, Petitioner claims that this finding is in error as she is entitled to fees and sets forth arguments. However, as stated in the Initial Decision and amplified above by case law, Petitioner has not demonstrated that the argument advanced by Union County is well settled. To that end, the Initial Decision's dismissal of the issue of attorney's fees was correct.

THEREFORE, it is on this ^{26th} day of JANUARY 2014

ORDERED:

That the Initial Decision in this matter is hereby ADOPTED.

A handwritten signature in black ink, appearing to read "Valerie Harr", written over a horizontal line.

Valerie Harr, Director
Division of Medical Assistance
and Health Services