



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MED-66/47172

The proposed decision of the hearing examiner dated February 2, 2001 is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison,
Wisconsin, this 12th day of March, 2001.

/s

Thomas E. Alt, Deputy Secretary
Department of Health and Family Services



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

(petitioner)

**PROPOSED
DECISION**

MED-66/47172

PRELIMINARY RECITALS

Pursuant to a petition filed December 14, 2000, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regards to the denial of Medical Assistance, a hearing was held on January 24, 2001, at West Bend, Wisconsin.

The issue for determination is whether the county agency correctly denied the petitioner's application for MA due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Robert G. Alexander
2675 North Mayfair Road, Ste. 304
Wauwatosa, WI 53226

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Maxine Ellis, ESS I
Jane Clune, ESS
Washington County Dept Of Social Service
333 E. Washington Street
Suite 3100
West Bend, WI 53095

EXAMINER:

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx, CARES PIN: xxxxxxxxxxxx) is an institutionalized resident of Washington County; he is 70 years old; and he applied for Institutional – MA twice.
2. On June 15, 2000, the petitioner applied for Institutional – MA; that application was denied due to: excess assets in the form of an IRA account of \$261,774.20; failure to complete verification; and a determination that he had divested \$150,000 into an annuity.
3. On October 12, 2000, the petitioner re-applied for Institutional - MA seeking back-dated eligibility.

4. The county agency issued a Notice of Decision on November 6, 2000, informing the petitioner that his application had been denied for all periods requested due to income in excess of MA program limits. See, Exhibit #1.
5. In determining the petitioner's countable income, the agency deemed to the petitioner the sum of \$5,350 per month; this was the estimated amount of term annuity payments that the petitioner, by his representatives, contracted to receive from a commercial term annuity. He was listed as the "annuitant/owner" of the annuity, and his community spouse was listed with the annuity payor company as the "payee". Checks are actually paid each month to the community spouse in her name, only. See, Exhibits #2 & #9, p.2.; see also, Summary of Maxine Ellis, dated December 15, 2000.
6. The petitioner filed an appeal with the Division of Hearings & Appeals on December 14, 2000.
7. The petitioner or a person acting on his behalf, transferred the sum of \$294,095.87 to the Lincoln Benefit Life Company, Lincoln, Nebraska, on or about September 10, 2000, into an irrevocable and variable annuity tied to a money market mutual fund. The "term" annuity lists the petitioner as the "annuitant/owner" and his wife as the "payee"; and Lincoln Benefit Life Company agreed to accept this payment and in return pay the petitioner's spouse annuity payments of approximately \$5,327 per month for 60 months, beginning thereafter in September or October, 2000. The community spouse began receiving these payment in at least October, 2000, payable in her name only.

DISCUSSION

In September, 2000, the petitioner transferred a large sum of cash, approximately \$294,095.87, into a commercial annuity. The petitioner is listed as the "annuitant/owner" of the annuity. The annuity is for a fixed period of 60 months. The petitioner's spouse is listed as the "payee", and she is expected to be paid approximately \$5,327 per month under this annuity. See, Exhibit #2. Thereafter, the petitioner applied for Institutional – MA, seeking backdated eligibility.

The county agency contacted its assigned regional expert from the Department of Health & Family Services about this fact pattern, and was informed to treat the annuity income stream as if owned by the petitioner, and therefore attributable to him for MA income limit purposes. See, Exhibit #4. The Department's expert opined that "...we think that the monthly payments from the annuity would still be owned by the annuitant, with his spouse listed as the payee. Typically, a payee does not own the income, but is responsible for how it is used." See, Exhibit #4. When this annuity was added to the petitioner's other income, his gross monthly income of \$6,565 far exceeded the applicable income limit of \$1,536. See, Exhibit #1, p.2.

The petitioner asserts that the annuity payment is an income stream to the community spouse, not the applicant. Since the MA program does not consider the re-allocation of assets between spouses to be a divestment, he asserts that this arrangement is not a divestment either. Attorney Alexander asserted, without citation to the applicable law, that Wisconsin law provides that "income" is attributable to the person named on the check as the person to whom it is payable.

The petitioner is an "institutionalized spouse" making an application for MA, and his wife is a so-called "community spouse". See, WI Stat § 49.455(1). The Wisconsin Administrative Code provides that no income of a community spouse can be deemed available to an institutionalized spouse applying for MA without a court order to that effect. WI Admin. Code § HFS 103.075(6)(a). Unless the institutionalized spouse shows by a preponderance of the evidence in a fair hearing that his or her ownership interest is otherwise, the Code and a statute require that non-trust income is to be considered the income of the person in whose name the payment is made, unless it is paid to both spouses, unspecified, or shared with others. WI Admin Code § HFS 103.075(6)(a)3. See also, WI Stat § 49.455(3)(b). The evidence clearly demonstrates that the payments are made in the name of the community spouse. See, Exhibits #2, #5, #7 & #9, p. 2.

The MA Handbook fails to specifically address the counting of annuity payments as *income*. See, App. 15.0.0, et. seq. (04-01-00). The Handbook, at Appendix 11.6.4, does discuss the treatment of annuities as an *asset*, providing as follows:

An annuity is a written contract under which, in return for payment of a premium or premiums, an individual will receive a series of payments at regular intervals for a specified time period.

The annuitant is the person entitled to the payments. A purchaser can name himself/herself or another person as the annuitant . The purchaser may also name a beneficiary to receive annuity payments after the annuitant's death.

The Handbook provides that the annuity becomes an unavailable asset on the date the "settlement option" is made final. Here, that event occurred on September 13, 2000. See, Exhibit #2. At App. 11.6.4.2.

The Department's expert clearly relied upon the language in the Handbook to conclude that because the policy says that the "annuitant is the person entitled to the payments", and because the annuity verification clearly indicates that the institutionalized spouse is the "owner/annuitant", that the payments must be attributed, or for lack of a better word, "deemed" to be received by him even though the annuity clearly provides that the community spouse is the payee. See, Exhibit #4 (e-mail from Barbara Mikkelson, DWD, dated October 31, 2000.) Ms. Mikkelson also relied upon an understanding of "payee" to mean someone who receives the payment on behalf of a separate owner.

I understand the common-sense logic of the Department's view of the word "payee". There are all kinds of payees, i.e., for example, "protective payees" in welfare cases and "representative payees" in Social Security matters. However, "payee" also means one who is paid by a "payer". It is obvious that that the petitioner, through his representatives, chose to set up this transaction with the securities company. He directed it to treat the asset as his; with him as the named owner/annuitant; and to have the annuity payments go to his wife. It is pretty difficult to escape the likewise reasonable reading of the "language" used in the law that if the wife is paid the annuity payments each month in her name, she satisfies the ownership test of the income under WI Admin Code § HFS 103.075(6)(a)3 & WI Stat § 49.455(3)(b). The husband owns the unavailable asset, but his wife owns the income paid to her in her name. There is no "care of" or "as payee for" language used in any check indicating otherwise. See, Exhibit #5. The Code provision is in conflict, as applied, with the statute and must yield.

The income is paid to the community spouse, and it may not be "deemed" to the institutional spouse. See, WI Admin. Code § HFS 103.075(6). This case is the same as any other case where the institutional spouse has insufficient income to meet his care needs and the community spouse has a large income stream. The county agency may seek to divert some of the community spouse's income stream by the use of a referral to its corporation counsel to investigate pursuit of a contribution from the community spouse under WI Stat § 49.90(2), i.e., to "compel maintenance".

The petitioner and his attorney, have made a bold stroke in transferring such a large sum into an irrevocable annuity and risking denial or divestment decisions of many years in potential adverse impact. But it is a *permitted* bold stroke. Legal counsel for the petitioner has obviously carefully considered the rules and the new statute, and carefully arranged the instant set of affairs. This begs the question of why these citations were not provided at the hearing. In any event, I must conclude that under the current state of the law, the payments of the term annuity to the community spouse are attributable as income to her only. The matter will be remanded to the county to remove the annuity payments from the institutionalized spouse's income stream, and to review and re-determine his eligibility for Institutional – MA.

CONCLUSIONS OF LAW

- 1) The county agency act of deeming the term annuity payments to the institutional spouse when they are actually paid to the community spouse in reliance upon MA Handbook App. 11.6.4.2, is contrary to the requirements of WI Admin Code § HFS 103.075(6)(a)3 & WI Stat § 49.455(3)(b); the policy interpretation must yield to the rule and statute.
- 2) The county agency has incorrectly denied the petitioner's application for Institutional – MA due to excess income, because it incorrectly attributed the term annuity payments to the community spouse to the institutional spouse's income stream; the matter must be remanded for review and re-determination.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency within instructions to rescind the denial of the petitioner's application for Institutional – MA; review and re-determine his eligibility for MA, attributing all annuity payments

to the community spouse, for all periods for which he may be eligible under his application including back-dating, with written notice. These actions shall be completed within 10 days of the date of the Secretary's Final Decision in this matter, *if and only if*, this Proposed Decision is adopted therein by the Secretary.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15 day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health & Family Services for final decision-making. The process relating to Proposed Decisions is described in WI Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 2nd day of February, 2001.

/s _____
Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
326/KDD