



Rhode Island Executive Office of Health and Human Services  
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July 23, 2015

Docket#15-923  
Hearing Date: June 10, 2015



### **ADMINISTRATIVE HEARING DECISION**

The Administrative Hearing that you requested has been decided against you. During the course of the proceeding, the following issue(s) and Agency regulation(s) were the matters before the hearing:

**EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES (EOHHS)  
MEDICAID CODE OF ADMINISTRATIVE RULES (MCAR)  
SECTION 0382: Evaluation of Resources**

The facts of your case, the pertinent Agency regulations, and the complete administrative decision made in this matter follow. Your rights to judicial review of this decision are found on the last page of this decision.

Copies of this decision have been sent to the following: You (the appellant in C/o your authorized representative), Catherine Gregoire-Long Term Care Ombudsman, and Agency representatives Jean Piasczyk, Cheryl LaFazia, Deborah Castellano, and Tom Conlon.

Present at the hearing were: your son, your daughter-in-law, Catherine Gregoire-LTC Ombudsman, and Agency representative Jean Piasczyk.

**ISSUE:** Is the appellant ineligible for Medicaid because her countable resources exceeded the program's resource limit of \$4,000.00 at the time of her application/request for Medicaid in January 2015?

**EOHHS Rules and Regulations:**

Please see the attached APPENDIX for pertinent excerpts from the Rhode Island Executive Office of Health and Human Services Medicaid Code of Administrative Rules (MCAR).

**APPEAL RIGHTS:**

Please see attached NOTICE OF APPELLATE RIGHTS at the end of this decision.

**DISCUSSION OF EVIDENCE:****The Agency representative testified:**

- At the time of her Medicaid application, the appellant had an annuity with a cash value of \$15,041.79.
- The appellant's son was named co-owner on the annuity so it was sent to an Administrator for review. The Administrator concluded that per policy, the entire annuity was a countable asset for the appellant.
- The annuity was cashed out on April 29, 2015. The value at that time was \$15,100.37.
- The appellant's son kept half of the funds.
- Some of the funds from the annuity were spent down as a resource reduction for the appellant by paying medical bills and making payments to the Nursing Home.
- Any question of transfers would only be addressed after eligibility has occurred.

**The appellant's son, with the assistance of his wife, testified:**

- Only half the cash value of the annuity should have been counted as the appellant's because the other half belonged to him.
- Per the submitted annuity contract, the date of inception was December 29, 1999.
- His name has been on the annuity as co-owner since its inception and the money was always half his.
- His social security number was also on the annuity.
- The money in the annuity was from the life insurance of the appellant's husband and/or his father.
- Over the years, both he and the appellant used some of the money, for example, when the appellant needed a car.

- Medical bills have been paid with the half of the annuity that belonged to the appellant, and the Agency has been provided with that information.
- His name was also on the appellant's CDs, and savings and checking accounts, but he is not refuting that those funds belonged to the appellant.

**The Long Term Care Ombudsman testified:**

- The appellant's annuity was jointly owned.
- There is no law or regulation in the State of Rhode Island as to how to consider an annuity that has joint ownership and joint social security numbers.
- The age of the annuity should also be considered.
- Money has been taken out of the annuity but if taken out prior to five years ago, that cannot be considered.
- The appellant's resources have been spent down on medical expenses.
- The appellant is allowed to retain \$4,000.00.

**FINDINGS OF FACT:**

- On April 15, 2015, the Agency sent the appellant a notice in c/o her son, informing her that her application for R.I. Medicaid had been denied for the month of January 2015 because her resources in the amount of \$15,041.79 were more than the program's resource limit of \$4,000.00.
- The April 15, 2015 notice of denial also informed the appellant of the process of establishing Medicaid eligibility on the basis of a Resource Reduction.
- The appellant's son submitted a request for hearing on behalf of his mother, received by the Agency on April 24, 2015.
- An Administrative Hearing was convened on June 10, 2015.
- At hearing, the appellant's son certified in writing and under oath that he was the appellant's authorized representative.

- The appellant applied for Medicaid in January 2015.
- At the time of application, the appellant was owner of an annuity of which she was also the annuitant.
- The appellant's son was co-owner of the annuity and was also the primary beneficiary.
- The appellant's grandchild was the secondary beneficiary.
- The annuity had an inception date of December 29, 1999 and a maturity date of December 29, 2019.
- On December 31, 2014, the annuity had a cash surrender value of \$14,955.55
- On March 12, 2015, the annuity had a cash surrender value of \$15,041.79.
- On April 29, 2015 the annuity was surrendered for its full cash value at that time of \$15,100.37.

## **CONCLUSION:**

The issue to be decided is whether the appellant is ineligible for Medicaid because her countable resources exceeded the program's resource limit of \$4,000.00 at the time of her application/request for Medicaid in January 2015.

There is no dispute that for Medicaid eligibility to exist, the appellant's countable resources cannot exceed \$4,000.00 as of the first moment of the month of her application, or she must reduce her resources to within the \$4,000.00 resource limit by making payments towards allowable expenses and verifying such to the Agency. There is also no dispute that at the time of the appellant's January 2015 application for Medicaid, she had an ownership interest in an annuity. The Agency argues that the appellant's annuity had a cash surrender value of \$15,041.79, all of which was a countable asset of the appellant for the purposes of determining her Medicaid eligibility, thereby rendering her ineligible for January 2015. The appellant's son/authorized representative argues that only half the value of the annuity should have been considered a countable asset of the appellant because he owned the other half. He further argues that since the annuity was subsequently cashed out and half of the proceeds used as

payment towards the appellant's medical bills, thereby reducing her resources to below the \$4,000.00 resource limit, the appellant should be eligible for Medicaid. The Agency further argues that while the Medicaid rules allow for proportional share ownership for some types of assets and allows an applicant to rebut the presumption of ownership of other types of jointly owned assets, the Medicaid regulations pertaining to annuities do not allow for proportional share ownership of annuities and/or to rebut the presumption of ownership. The LTC ombudsman argues that there is no law or regulation in the State of Rhode Island as to how to consider an annuity that has joint ownership and joint social security numbers.

The evidence record establishes that the annuity was established on December 29, 1999. The appellant was named as owner and annuitant and her son was named as co-owner and primary beneficiary. The appellant's grandson was named as secondary beneficiary. On December 31, 2014, the annuity had a cash surrender value of \$14,955.55 and on March 12, 2015 it had a cash surrender value of \$15,041.79. On April 29, 2015 the annuity was surrendered for its full cash value at that time of \$15,100.37. The Agency concedes that some of the funds from the cashed out annuity were spent down as a resource reduction for the appellant by paying medical bills and making payments towards her Nursing Home bill. The appellant's son concedes that only half of the funds from the cashed out annuity were spent towards the appellant's expenses.

A full review of the Medicaid Code of Administrative Rules (MCAR) for institutionalized individuals finds that different types of resources are evaluated differently and that each resource must be evaluated using the specific methodology outlined in the MCAR for the specific type of resource being evaluated. Per MCAR section 0382.15.35 titled annuities, an annuity is defined as "an investment of funds from which an individual is paid or promised regular payments over a lifetime or a fixed period of time." Per the regulation, all applicants are required to disclose any interest that they have in an annuity and when an applicant has an interest in an annuity that can be surrendered or cashed in, the cash value must be considered and counted as an available resource in the determination of the applicant's Medicaid eligibility. The regulation does not specify whether an applicant's interest in the annuity must be as owner and/or annuitant. The regulation further does not provide for any proportional ownership share for jointly owned annuities and/or for any consideration relative to the source or owner of the funds which established the annuity. The absence of any such stipulations is further indication that any interest in an annuity renders the full cash surrender value of the annuity as a countable resource for the applicant. It should also be noted, regardless of the source of the funds and the son's claim that half of the funds used to establish the annuity were his,

the appellant is the annuitant, which is evidence that the annuity was established for the appellant's benefit. Therefore, even if the appellant's son contributed half of the funds which created the annuity, he did so with the intention of providing a benefit to the appellant in the form of future payments. Such a financial benefit must be considered when determining her eligibility for Medicaid.

In conclusion, the appellant has an interest in an annuity as both owner and annuitant, which renders the full cash surrender value a countable resource when determining her Medicaid eligibility. As of January 1, 2015, the first moment of the month of the appellant's Medicaid application, the annuity had a cash surrender value of \$14,955.55, not \$15,041.79 as determined by the Agency. It should be noted, while the appellant's son testified that the appellant also had other bank accounts, the Agency made no reference to any other resources and the Agency's denial appears to be based solely on the value of the annuity as calculated by the Agency.

After a careful review of the MCAR, as well as the testimony and evidence submitted, this Appeals Officer finds that the appellant is ineligible for Medicaid because her countable resources exceeded the program's resource limit of \$4,000.00 at the time of her application/request for Medicaid in January 2015. The appellant's request for relief is thereby denied.

The appellant retains the right to establish Medicaid eligibility in the manner provided under the Medicaid regulations based on this Administrative Decision and the finding that the annuity is a countable resource with a value of \$14,955.55.



Debra L. DeStefano  
Appeals Officer

APPENDIX

## MEDICAID CODE OF ADMINISTRATIVE RULES (MCAR)

(Pertinent excerpts)

### 0382 Evaluation of Resources

#### 0382.05 First Moment of the Month Rule

REV: 06/1994

Countable resources are determined as of the FIRST MOMENT OF THE MONTH (FOM). The determination is based on the resources the individuals own, their value, and whether or not they are excluded as of the first moment of the month. The FOM rule establishes a point in time at which to value resources; what a person owns in countable resources can change during a month but the change is always effective with the following month's resource determination.

The kinds of changes that can occur are:

- CHANGES IN VALUE OF EXISTING RESOURCES

The value of an existing resource may increase or decrease. For example, the value of a share of stock may decrease by \$30 or increase by \$20.

- DISPOSITION OR ACQUISITION OF RESOURCES

An individual may dispose of an existing resource (e.g., close a savings account and purchase an item) or may acquire a new resource (e.g., an inheritance which is subject to the income-counting rules in the month of receipt).

- CHANGE IN EXCLUSION STATUS OF EXISTING RESOURCES

An individual may replace an excluded resource with one that is not excluded (e.g., sell an excluded automobile for non-excluded cash) or vice versa (use non-excluded cash to purchase an excluded automobile). Similarly, a time-limited exclusion (such as the period for exclusion of retroactive Title II benefits) may expire.

Changes such as SSI, SSA, and Lump Sums do not affect the countable value of resources in the month in which they occur. Any change does not affect countable resources until the first moment of the following month.

If countable resources exceed the limit as of the first moment of a month, the recipient is not eligible for that month, unless the resources are reduced by expenditure on certain allowable expenses, see Section 0380.45, RESOURCE REDUCTION.

Resources are evaluated using the methodologies set forth in the remainder of Section 0382 for the various types of resources. Each type of resource has its own unique deductions, exclusions, and methods for evaluation to determine its countable value. If not otherwise indicated, the countable value of a resource is the equity value (fair market value less legal encumbrances).

Once the countable value of each resource (after the appropriate exclusions/deductions) is determined, the countable values of all resources (including deemed resources) are added together to determine the total countable resources for the institutionalized individual.

#### 0382.15 Intangible Personal Property

REV: 06/1994

Intangible personal property includes those resources which are in cash or payable in cash on demand, and financial instruments convertible into cash. The most common types of intangible

personal property are savings accounts, checking accounts, NOW accounts, certificates of deposit, money market accounts, stocks, bonds, and mutual funds.

Other intangible resources include promissory notes, loans which may not be secured by promissory notes, and mortgages. Such personal property is always a countable resource, except as excludable under this section.

### **0382.15.35 Annuities**

REV: February 2014

An annuity is an investment of funds from which an individual is paid or promised regular payments over a lifetime or a fixed period of time. Generally an annuity is established with a lump sum of money which is paid to a bank, insurance company, or other entity.

A deferred annuity is one under which payments begin at some date to be specified in the future. Once an individual selects a periodic payment option (frequency, amount and duration of payments), and begins to receive income, the annuity has been annuitized.

An annuity may guarantee periodic payments for a stated period (termed period certain) or guarantee periodic payments for the remainder of the life of the individual, without regard to how long the individual lives (termed life annuity).

All applicants must disclose any interest in an annuity that the applicant or his/her spouse has at the time of application and/or recertification of eligibility. Under 42 U.S.C.1396p(e), as amended by the Deficit Reduction Act, the State becomes a remainder beneficiary of all of the couples' annuities (or other similar financial document) which were purchased or transacted by either spouse on or after February 8, 2006 by virtue of the provision of such Medicaid up to the amount of Medicaid paid on behalf of the institutionalized spouse.

Upon the determination that an applicant is eligible for benefits under LTSS-Medicaid, the Medicaid agency will notify the issuer of any annuity disclosed for purposes of section 1917(c)(1)(F) of the State's rights as a preferred remainder beneficiary.

The Medicaid agency will additionally require the issuer of the annuity to notify the Medicaid agency regarding any changes in disbursement of income or principal from the annuity.

When determining eligibility for Medicaid **COUNT AS AN AVAILABLE RESOURCE:**

The cash value of an annuity which can be surrendered or "cashed in." The cash value is equal to the amount of money used to establish the annuity, plus any earnings, minus any earlier withdrawals and surrender fees. No consideration in determining cash value is given for income tax withheld or tax penalties for early withdrawal.

Annuity contracts that do not allow for cash surrender but instead allow the owner to sell the annuity on the open market are assignable. Annuity contracts that are silent regarding assignability are presumed to be assignable. Assignable annuities are countable resources. The countable value of the resource is equal to the outstanding principal balance, unless the individual can furnish evidence from a reliable source which shows that the annuity is worth a lesser amount. Reliable sources include banks, other financial institutions, insurance companies, brokers, viatical settlement companies, etc.

#### **Count as Available Income:**

Payments made to the individual from an annuity are counted as unearned income. Any change in the income from the annuity must be reported within ten (10) days to the agency and may affect

eligibility and/or post eligibility treatment of income.

**Transfer of Asset Provisions for Institutionalized Individuals May Apply When:**

A non-cashable, non-assignable annuity was purchased by the individual (or by the individual's spouse):

- Within thirty-six (36) months (if purchased prior to February 8, 2006), or OR
- Within sixty (60) months (if purchased or after February 8, 2006)
- Immediately prior to, or any time after, the date the individual was both institutionalized and applied for Medicaid. See Sec. 0384.10 for description of how the 5-year look-back on resource transfers is phased in).

In this case, a determination must be made as to whether its purchase constitutes a transfer of assets for less than fair market value.

**Determine Whether Any Annuities Create a Penalty Period of Ineligibility For LTSS-Medicaid**

A non-cashable, non-assignable annuity purchased by the individual (or by the individual's spouse) may be determined to be a transfer of assets for less than fair market value, and therefore create a penalty period of ineligibility.

There are two situations in which this may occur:

1. When the asset was literally converted, within certain time frames, into an annuity which does not meet the criteria for being a "VALID TRANSFER FOR FAIR MARKET VALUE" in return (See the remainder of this Section, along with Section 0356.15.35 AND 0384.35 for detailed discussions of these topics).

and/or

2. When the annuity (if purchased on or after February 8, 2006) does not name the "State as Beneficiary" of the annuity.

When such an annuity does not comply with this requirement, it is defined as being a transfer for less than fair market value.

(This requirement to name the state as beneficiary is found in Section 1917(c)(1)(F)(i) of the Social Security Act (42 U.S.C.) 1396p(c)(1)(F)(i)), as added by section 6012(b) of the Deficit Reduction

Act of 2005, and as amended by the Tax Relief and Health Care Act of 2006. (See the remainder of this Section, along with Section 0356.15.35 AND 0384.35 for detailed discussions of these topics).

Time-frames for evaluating the transfer of resources DHS may "look back" at resource transfers for the 36 months, or for the 60 months, immediately prior to the date that the individual was both institutionalized, and applied for LTSS-Medicaid.

(Transfers which occurred prior to February 8, 2006 are subject to the 36 month "look back").

(Transfers which occurred on or after February 8, 2006 are subject to the 60 month "look back").

Additionally, transfers which occur any time after the application are also evaluated to determine whether they generated a penalty period of ineligibility for LTSS-Medicaid.

(See Section 0356.15.35 and 0384.10 and 0384.35 for detailed discussions of these topics).

To be considered a valid transfer for fair market value, an annuity must:

- Be irrevocable and non-assignable;
- Provide regular payments in both frequency and amount, with no deferral and no balloon

payments, to or for the sole benefit of the individual; and

- Be actuarially sound. Scheduled payments must return at least the principal within the number of years of expected life remaining for the individual.

Life expectancy tables compiled from information by the Office of the Chief Actuary of the Social Security Administration for this purpose are used to determine the number of years of expected life remaining for the individual. (See MCAR Section 0382.15.35.05).

If based on life expectancy tables compiled by the Social Security Administration's Office of the Actuary and published by HCFA CMS, the individual is not expected to live longer than the guaranteed period of the annuity, the guaranteed period of the annuity, the annuity is not actuarially sound, and a transfer of assets for less than fair market value has taken place. The transfer is considered to have taken place at the time the annuity was purchased. The uncompensated value of the transfer is based on the amount projected to be paid beyond the individual's reasonable life expectancy. (See Section 0384- Resource Transfers).

If an annuity is purchased or transacted on or after February 8, 2006 whether by the applicant or by their spouse, the beneficiary clause of the annuity must provide that the beneficiary of the annuity is as follows:

- Must, except as provided in this section, name the State of Rhode Island as the remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of the institutionalized individual.
- If, however, the institutionalized individual has a minor or disabled child, such child may be named as the beneficiary in the first position, provided the State of Rhode Island is named as beneficiary of the annuity in the second position for at least the amount of Medicaid paid on behalf of the institutionalized individual.
- In the event such child or his or her representative disposes of any such remainder for less than fair market value, the State of Rhode Island must be named in the first position.
- Any change in the beneficiary clause must be reported to the Medicaid agency within ten (10) days of any change, and may result in a transfer of assets penalty.

An institutionalized spouse, that is, an institutionalized individual who has a community spouse:

- Must, except as provided in this section, name the State of Rhode Island as the remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of such institutionalized spouse.
- However, the institutionalized spouse may name as the beneficiary in the first position his or her community spouse or his or her minor or disabled child, provided the State of Rhode Island is named as beneficiary of the annuity in the second position for at least the amount of Medicaid paid on behalf of the institutionalized spouse.
- In the event the community spouse or such child or his or her representative disposes of any such remainder for less than fair market values, the State of Rhode Island must be named in the first position.
- Any change in the beneficiary clause must be reported to the Medicaid agency within ten (10) days of any change, and may result in a transfer of assets penalty.

A community spouse:

- Must name the State of Rhode Island as the remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of his or her institutionalized spouse.

- The community spouse may not change the beneficiary of the annuity after the death of the institutionalized spouse.
- Any change in the beneficiary clause, before or after the death of the institutionalized spouse, must be reported to the Medicaid agency within ten (10) days of any change and may result in a transfer of assets penalty.

In the event the community spouse becomes institutionalized and applies for Medicaid, the beneficiary clause must be amended to additionally name the State of Rhode Island as the remainder

beneficiary in the first position for at least the amount of Medicaid paid on behalf of such community spouse who becomes institutionalized, at the time such spouse applies for Medicaid for himself or herself, if the annuity was purchased during the look-back period.

Cases involving annuities are referred by field staff to the LTSS Administrator (or his/her designee) for evaluation. The agency representative forwards a copy of the annuity document, including date of purchase to the LTSS Administrator.

The LTSS Administrator (or his/her designee) consults, as needed, with the Office of Legal Services, and determines:

- Whether the annuity is an available or unavailable resource;
- The countable amount of the resource (i.e., the cash surrender value and/or negotiable value of the annuity); and
- Whether the State has been made a remainder beneficiary for at least the amount Medicaid paid on behalf of the institutionalized individual; and

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- Whether a transfer of assets for less than fair market value has occurred as well as the amount of the uncompensated value and date of the transfer.

### **NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Human Services pursuant to RI General Laws §42-35-12. Pursuant to RI General Laws §42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.