

FEB 14 2007

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STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

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DEPT. OF CHILDREN & FAMILIES

[REDACTED]
LAKE WORTH, FL 33467-0000

APPEAL NO. 06F-07762

PETITIONER,

Vs.

CASE NO. 1249946018

FLORIDA DEPT OF CHILDREN AND FAMILIES
DISTRICT: 09 Palm Beach
UNIT: 88322

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on January 23, 2007, at 11:27 a.m., in Lake Worth, Florida. The petitioner was not present. Representing the petitioner was Michael W. Connors, Esq., P.A. Appearing as witnesses were: Larry Marcus, estate planner and insurance specialist; Sonja Kobrin, owner, VIP Care Management; and Marta Strong, benefit specialist manager, VIP Care Management. Representing the Department was Terry Verduin, attorney, District 9 Legal. Appearing as a witness was Chuck Maikkula, specialist II. Present as a court reporter was Teresa Wolfe. The record remained open for two weeks (until February 6, 2007) in order that the parties might submit Proposed Final Orders. The Proposed Findings of Fact and Conclusions of Law submitted by Mr. Connors was received January 25, 2006. No proposal was submitted by the respondent.

ISSUE

At issue was whether the Department was correct in denying Institutional Care Program (ICP) Medicaid due to the petitioner transferring funds (assets) that exceeded Program eligibility limits. The petitioner is seeking all benefits from the date of application and any retroactive benefits effective August 31, 2006. The petitioner carries the burden of proof.

FINDINGS OF FACT

The petitioner is a ninety year old (DOB [REDACTED]) resident of a nursing facility since August 31, 2006. An application for Institutional Care Program (ICP) Medicaid benefits was submitted, on his behalf, September 27, 2006. As part of the eligibility determination process, the Department must consider, among all factors, the petitioner's assets and whether a transfer of those assets occurred.

Prior to the submission of the application, the petitioner purchased a reversionary annuity insurance policy September 22, 2006. Whenever there is a financial instrument involved with the application, the Department will seek guidance as to how it should be treated.

On October 9, 2006, the Department's caseworker made inquiry to the Department's Program office as to how to treat the reversionary annuity. The request was submitted citing the Department's policy 1640.0505.04, Retirement Funds. The caseworker and her supervisor sought advice as to whether the reversionary annuity should be excluded or counted as an asset. This financial product was purchased for

\$127,226 with the two beneficiaries to receive monthly amounts over the course of their lives or ten years, whichever occurs first.

The Program office sent the inquiry to its Tallahassee headquarters October 12, 2006. Headquarters responded by telephone November 9, 2006 and on their internet site November 15, 2006:

The reversionary annuity policies appear to be some sort of an annuity, but the end result would be the same for eligibility whether it is treated as an annuity or as life insurance. The fact the individual purchases something and does not receive fair compensation in his/her lifetime is the deciding factor. In either case, the client doesn't get fair compensation (someone else gets it when they die), so it is treated as a transfer of assets without fair compensation.

Upon receipt of this information, the Department denied the application November 16, 2006. However, the Department does concede that there are assets that it will not consider (excluded) such as one vehicle, one home (property), and life insurance with no cash value.

The petitioner's representative, with the assistance of Mr. Marcus, explains that Black's Law Dictionary defines an annuity as:

A right to receive fixed, periodic payments, either for life or for a term of years. Special rules apply to employee retirement plan annuities.

Further, using A Handbook of Personal Insurance Terminology, 1968, the definition of reversionary annuity is:

A life insurance policy conditioned on the survival of the beneficiary beyond the life of the insured and payable to the beneficiary at a stated amount per month or year only so long as the beneficiary lives and commencing with the death of the insured.

Using the same source, the definition of annuity, survivorship is:

An annuity payable to the annuitant for the period during which he survives the insured. Also known as a reversionary annuity, it is in fact a life insurance contract coupled with an annuity agreement. One life is insured in order to provide a life annuity for a second life.

The application for the reversionary annuity states a guarantee issue, a term used when purchasing insurance, not an annuity. This financial product has no cash surrender value, is irrevocable, and non-assignable. This is not a retirement fund. As Mr. Marcus explains the major difference between a term life insurance policy and a reversionary annuity is that upon the death of the insured, a term life policy holder will receive a lump sum payment. With a reversionary annuity, the benefit is paid out in monthly amounts over the course of the contracted period.

This financial product was issued by Fidelity and Guaranty Life Insurance Company as a life insurance policy with the approval of Florida's Office of Insurance Regulation (Petitioner's Exhibit 9).

The Department notes that the application for the reversionary annuity wanted it to be rushed for approval due to Medicaid time deadlines. To them this was an indication that a transfer had taken place, to shelter the asset. The Department explains that the funds used to purchase the reversionary annuity could have been used to pay for the nursing home.

Finally, the representative explains that the reversionary annuity is an irrevocable life insurance policy with no cash value that should be excluded as any other term life policy would be. It is not a retirement fund annuity.

CONCLUSIONS OF LAW

Fla. Admin. Code 65A-1.303 Assets states in part:

(1) Specific policies concerning assets vary by program and are found in federal statutes and regulations and Florida Statutes.

(2) Any individual who has the legal ability to dispose of an interest in an asset owns the asset.

(3) Once the individual's ownership interest of an asset(s) is established, the availability of that asset must be determined. Asset(s) determined not to be available are not considered in determining eligibility. Assets are considered available to an individual when the individual has unrestricted access to it. Accessibility depends on the legal structure of the account or property. An asset is countable, if the asset is available to a representative possessing the legal ability to make the asset available for another's support or maintenance, even though the representative chooses not to do so. Assets not available due to legal restrictions are not considered in determining total available assets unless the legal restrictions were caused or requested by the individual or another acting at their request or on their behalf.

65A-1.702 **Special Provisions** states in part:

(1) Rules 65A-1.701 through 65A-1.716, F.A.C., implement Medicaid coverage provisions and options available to states under Titles XVI and XIX of the Social Security Act.

(2) **Date of Eligibility.** The date eligibility for Medicaid begins. This was formerly called the date of entitlement. The date of eligibility includes the three months immediately proceeding the month of application (called the retroactive period). Eligibility for Medicaid begins the first day of a month if an individual was eligible any time during the month....

65A-1.712 **SSI-Related Medicaid Resource Eligibility Criteria** states in part:

(1) **Resource Limits.** If an individual's total resources are equal to or below the prescribed resource limits at any time during the month the individual is eligible on the factor of resources for that month. The resource limit is the SSI limit specified in Rule 65A-1.716, F.A.C....

(2) **Exclusions.** The department follows SSI policy prescribed in 20 C.F.R. Part 416 in determining what is counted as a resource with the following exceptions, as mandated by federal Medicaid policies, or additional exclusions, as adopted by the department under section 42 U.S.C. § 1396a(r)(2).

(c) The cash surrender value of life insurance policies is excluded as resources if the combined face value of the policies is \$2,500 or less.

(3) Transfer of Resources and Income. According to 42 U.S.C. § 1396p(c), if an individual, the spouse, or their legal representative, disposes of resources or income for less than fair market value on or after the look back date, the department must presume that the disposal of resources or income was to become Medicaid eligible and impose a period of ineligibility for nursing facility care services or HCBS waiver services. The look back period is 36 months prior to the date of application, except in the case of a trust treated as a transfer in which case the look back period is 60 months prior to the date of application. These transfer policies apply to actual transfers made by applicants for institutional Hospice services that occur on or after October 1, 1998.

(a) The department follows the policy for transfer of assets mandated by 42 U.S.C. §§ 1396p and 1396r. For transfers prior to October 1, 1993, transfer policies apply only to transfers of resources. For transfers on or after October 1, 1993, transfer policies apply to the transfer of income and resources.

(b) When funds are transferred to a retirement fund, including annuities, within the transfer look back period the department must determine if the individual will receive fair market compensation in their lifetime from the fund. If fair compensation will be received in their lifetime there has been no transfer without fair compensation. If not, the establishment of the fund must be regarded as a transfer without fair compensation. Fair compensation shall be calculated based on life expectancy tables published by the Office of the Actuary of the Social Security Administration. See Rule 65A-1.716, F.A.C.

(c) No penalty or period of ineligibility shall be imposed against an individual for transfers described in 42 U.S.C. § 1396p(c)(2).

42 U.S.C. § 1396p(c)(2) states in pertinent part:

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that -

(A) the assets transferred were a home

(B) the assets

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary;

(4) A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection.

Fla. Integrated Pub. Policy Manual states in part:

1640.0505.04 Retirement Funds (MSSI, SFP)

Retirement funds are annuities or work-related plans for providing income when employment ends (e.g., retirement plans administered by an employer or union, disability, or pension). Other examples are funds held in an individual retirement account (IRA) and plans for self-employed individuals (sometimes referred to as Keogh plans).

Retirement funds must be considered as an asset or as income, unless they are considered unavailable. Retirement funds purchased on or after April 1, 1995, may be regarded as a transfer of assets under certain conditions (see special policy on ICP, etc., below).

If an individual is eligible to receive regular periodic payments from a retirement fund, the payments are considered unearned income and the fund is not considered an asset to the individual. (If the individual is eligible to receive payments but elects not to, he is ineligible due to failure to file for other benefits to which he is entitled.)

If the individual is not eligible to receive periodic payments from the fund, the funds are considered an asset in the amount that is currently available. Any penalty imposed due to early withdrawal can be deducted when computing the value of the funds, but any taxes due are not deductible.

A retirement fund is not an asset if an individual must terminate employment in order to obtain any payment.

In the month a previously unavailable retirement fund becomes available, it is neither an available asset nor income unless a periodic payment is received. If a periodic payment is received, it is considered unearned income. In the month following the month the fund becomes available, the fund must be considered an available asset to the individual unless periodic payments begin, in which case the payment is considered unearned income.

For example, the client owns an IRA which is unavailable until he turns age 59 in December. He must begin to receive periodic payments in January or the IRA will be considered an available asset to him. If he receives periodic payments, the payment is considered unearned income to him beginning in January, and is not considered an asset in December.

The following policy applies to ICP, institutionalized MEDS-AD, and HCBS only:

1. If a retirement fund purchased on or after 04/01/95 is established within the transfer of assets look-back period, an evaluation must be done to determine if the individual can expect to receive fair compensation from the fund in his lifetime (see passage 1640.0609.02).

2. If the individual can expect to receive fair compensation from the retirement fund in his lifetime, no transfer of assets (or income) has

occurred. If he cannot expect to receive a fair return in his lifetime, the establishment of the account must be regarded as a transfer of assets.

Refer to Section 1640.0600, et seq., for procedures on how to determine if fair compensation will be received and if not, how to compute the uncompensated value of the fund.

1640.0554 Life Insurance (MSSI, SFP)

A life insurance policy is considered only to the extent of its cash surrender value. However, if the face value of all life insurance policies on any one individual totals \$2,500 or less, no part of the cash surrender value of any such policy or policies will be taken into account. Life insurance having no cash surrender value (for example, term insurance or burial insurance) is not considered in determining the face value of insurance and is excluded from all computations.

The respondent denied the petitioner's application as they believe the petitioner transferred assets without receiving fair compensation. The critical questions are how to define the financial instrument in question, the reversionary annuity, and whether the Department correctly viewed the purchase as an asset transfer. The petitioner has the burden of proof to show that fair compensation was received.

Evidence and testimony given by the petitioner's representative and witness indicate that the reversionary annuity is a life insurance policy. The beneficiary is paid out in monthly installments following the death of the policy holder rather than as one lump sum as if it were a term life insurance policy.

The Department is focused on the "annuity" term and compares it to the typical annuity found in retirement contracts. The retirement contract provides that an individual will be considered as receiving fair compensation if the dollar amount of the payments anticipated to be received based the on life expectancy tables equals the amount of the

transfer. An example is an individual with a five year (60 month) life expectancy transfers \$60,000 and receives \$1,000 per month in payments. In this example there is no argument that the petitioner will receive fair compensation in their lifetime from the purchase.

The petitioner argued reversionary annuity policies is used as a term to be coupled with the life insurance aspect to indicate the type of payout only. Because this product is life insurance with no cash value and not a retirement fund, is irrevocable, and non-assignable, it is, solely as a financial instrument, excluded as an asset. The hearing officer agrees that the reversionary annuity policy has no value that would be considered available to the petitioner under the program rules.

However, although the value of a reversionary annuity policy is excluded in determining the petitioner's eligibility, the petitioner's action to transfer funds that could have been used to meet his nursing needs to a financial instrument that makes those funds unavailable should be considered a transfer of assets under the program rules.

As to the aspect as to whether there was a transfer of an asset, the hearing officer relies on 55A-1.712(3)(c) which in turn refers to U.S.C. § 1396p(c)(2).

The U.S.C. allows exclusions for the transfer of a home. This is not relevant to this case. Exclusion allowance is also made if the assets were transferred to a spouse or to benefit the spouse. Again, this is not relevant here as the beneficiaries were the son and daughter-in-law.

There is no exclusion listed in the transfer rules that provides that transfer to a reversionary annuity would be excluded from the fair market value test. The part that

would, in this hearing officer's opinion be most relevant, is that this asset was transferred without fair market value, and the transfer was made exclusively for a purpose other than to qualify for medical assistance.

There was no evidence or testimony presented that would indicate that the reversionary annuity was purchased for a purpose other than to qualify for medical assistance. The purchase of the reversionary annuity, five days before applying for ICP Medicaid, and not meeting any of the exclusionary standards, allows the Department to apply its transfer penalty.

DECISION

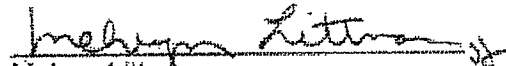
The appeal is denied. The Department's action is affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

FINAL ORDER (Cont.)
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DONE and ORDERED this 14th day of February, 2007,
in Tallahassee, Florida.


Melvyn Littman
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