[redacted]	*	BEFORE MICHAEL J. WALLACE,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
FREDERICK COUNTY	*	OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF SOCIAL	*	OAH No.: DHMH-FRED-10A-14-14770
SERVICES	*	

* * * * * * * * * * * * *

DECISION

STATEMENT OF THE CASE

The Appellant applied for Medical Assistance (MA) Long Term Care (LTC) benefits with the Frederick County Department of Social Services (local department) in October 2013. The local department, on behalf of the Maryland Department of Health and Mental Hygiene (DHMH), granted the application but counted an annuity of the Appellant as income. On April 24, 2014, the Appellant appealed, claiming that the local department had incorrectly characterized the payments to the community spouse as income available to the Appellant.

I held a hearing on June 11, 2014 at the local department's office in Frederick, Maryland. Code of Maryland Regulations (COMAR) 10.01.04. Leslie Slaby, Appeal Coordinator, Case Manager (CM), represented the local department. [redacted] Esquire, represented the Appellant, who was not present.

Procedure is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, and the Procedures for

Fair Hearing Appeals under the MA Program. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); Code of Maryland Regulations (COMAR) 28.02.01, 10.01.04.

ISSUE

Did the local department properly characterize the Appellant's annuity as available income to the Appellant?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the local department's Summary for Appeal Hearing, LD #1, with the following attachments:

- Hearing request by Appellant, dated April 22, 2014
- COMAR 10.09.24.10
- Excerpt from Maryland Medical Assistance Manual (MMAM) and Release No. MR-140
- MA Application, dated October 1, 2013 and attachments
- Annuity Application, dated July 31, 2013
- Computer generated Narrative of local department
- Notice of Denial, dated November 18, 2013, Notice of Eligibility, dated March 31, 2014

The Appellant submitted the following, which were identified as Appellant's Exhibits 1 through 3 as follows:

1. Notice of Eligibility, dated March 31, 2014
2. Annuity Application, dated July 31, 2013, with attached Amendment, dated August 23, 2013
3. Letter from Elco Mutual Life and Annuity, dated April 1, 2014

Testimony

Leslie Slaby, Case Manager, and Shelly Grimm, Caseworker, testified on behalf of the local department. The Appellant did not present any testimony.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant applied for M.A. in October 2013 and resides in a long term care facility. He entered the facility in August 2013. His spouse resides in the community.
2. The Appellant held an IRA and used the funds from the IRA to purchase an annuity from Elco Mutual Life and Annuity on July 31, 2013. The annuity named the community spouse as well as the State of Maryland as beneficiaries. The amount converted to an annuity was $84,000.00.
3. The annuity was structured to pay the community spouse monthly payments, and was irrevocable and not assignable.

DISCUSSION

Financial eligibility for MA-LTC is determined, in part, on the basis of the countable resources of the members of the assistance unit. COMAR 10.09.24.10B(1). When the countable resources are greater than the maximum allowable resource level, an applicant is ineligible for MA-LTC benefits. COMAR 10.09.24.08L; COMAR 10.09.24.10D(1).

For MA-LTC purposes, resources are defined, in part, as accumulated personal wealth over which a person has the authority or power to liquidate his or her interest, including bank accounts. COMAR 10.09.24.08B(1). Resources are only countable if they are available to the owner. A resource is available if there is no legal impediment to liquidation, i.e., if the owner has the right, authority, or power to dispose of the resource. *Maryland Medical Assistance Manual*, Section 800.2.

In this case, the Appellant argued that the local department incorrectly considered the annuity to be countable income to the Appellant. He maintained that the Annuity was structured to provide monthly payments to the Appellant's wife, the community spouse, and that it was irrevocable and non-assignable. As such, the monthly payments were not made to the Appellant but to his wife. Therefore, it should not have been considered as income to him.

The Appellant presented the testimony of Dale Krause of Krause Financial Services, the representative of the company that sold the annuity to the Appellant. Mr. Krause stated that on July 31, 2013, the Appellant converted an IRA to an annuity directing that any income be distributed to his wife. In accord with his wishes, the annuity was structured to provide equal monthly payments to his wife over a five year period. He testified that the annuity was irrevocable and non-assignable and that the Appellant's wife is the only one who can negotiate the check payments.

The local department representatives argued that the annuity belongs to the Appellant, that he is in control of the instrument and as such, any proceeds should be counted as income to him.

With respect to the issue of the annuity, federal law provides as follows:

42 U.S.C. 1390p(c)(1)(G),

> For purposes of this paragraph *with respect to a transfer of assets*, the term "assets" includes an annuity *purchased by or on behalf of the annuitant who has applied for medical assistance* with respect to nursing facility services or other long-term care services under this subchapter unless-
> (I) the annuity is-
> an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1996, or
> (I) purchased with proceeds from-
> (aa) an account or trust described in subsection (a), (c) or (p) of section 406 of such Code, or
> (bb) a simplified employee pension (within the meaning of section 406k) of such Code, or
> (cc) a Roth IRA described in section 406A of such Code, or
> (ii) the annuity-
> is irrevocable and nonassignable
> (I) is actuarially sound with actuarial publications of the office of the Chief Actuary of the Social Security Administration; and
> (II) provides in equal amounts during the term of the annuity with no deferral and no balloon payments made. (emphasis added)

This section applies to transactions between spouses.

The way an asset is treated can make a difference in what assets a couple can retain. A resource must be spent, while income is merely subtracted from the cost of care. Those seeking to minimize the use of their own assets, and thereby increase the government's share of the cost, would obviously seek to convert a resource into income, preferably income to the community spouse. Hence, there are transfers from one spouse to another, which is what 42 U.S.C. 1390p(c)(1)(G) addresses.

Annuities have been a useful asset preservation tool to accomplish this very goal. For example, if the law allows the spouse who is not in the nursing home to keep only $95,000, but the couple has $195,000, rather than spend $100,000 on the nursing home before Medicaid will pay, the spouse who is not in the nursing home could purchase an annuity for $100,000 instead. Then Medicaid will pay for the nursing home care the following month, and the couple can retain all $195,000, although it must be titled in the other spouse's name.

The critical difference between income and a resource is the value of and access to the funds by the owner. If the community spouse in the example above, takes the $100,000 of a resource and converts it into a stream of income with a future value of $100,000, he has not "transferred a resource for less than fair market value." An eighty-year-old spouse who creates a $100,000 annuity from which he will only receive $10,000 during his expected lifetime would have disposed of ninety percent of the resource.

These annuities are permissible if made in accordance with federal Medicaid rules. However, Congress enacted the Deficit Reduction Act (DRA) in 2006. The reason it was called the Deficit *Reduction* Act was because Congress, like married couples, was attempting to minimize *its* share of the cost by requiring the two spouses to pay more from their own assets before the federal government contributed, or by obtaining a lien on those assets that remain after the owner dies. This also makes it more difficult to pass assets, which could be used for care, on to later beneficiaries.

In the federal version of the MA Manual, the Centers for Medicare and Medicaid Services clarified the changes in the law immediately upon DRA's enactment.

B. Requirement to Name the State as a Remainder Beneficiary on Annuities

Section 6012(b) of the DRA adds a new section 1917(c)(1)(F) which provides that the purchase of an annuity shall be treated as a disposal of an asset for less than fair market value unless the State is named as a remainder beneficiary. Unlike the new section 1917(c)(1)(G) added by section 6012(c) of the DRA (discussed in detail below), section 1917(c)(1)(F) does not restrict application of its requirements only to an annuity purchased by or on behalf of an annuitant who has applied for medical assistance for nursing facility or other long term-care services. **Therefore, we interpret section 1917(c)(1)(F) as applying to annuities purchased by an applicant or by a spouse, or to transactions made by the applicant or spouse.** (emphasis added)

Under the DRA an annuity must name the State as the remainder beneficiary in the first position for the total amount of medical assistance paid on behalf of the annuitant, unless there is a community spouse and/or a minor or disabled child. A child is considered disabled if he or she meets the definition of disability found at section 1614(a)(3) of the Act. If there is a community spouse and/or any minor or disabled child, the State may be named in the next position after those individuals. If the State has been named after a community spouse and/or a minor or disabled child, and any of those individuals or their representatives dispose of any of the remainder of the annuity for less than fair market value, the State may then be named in the first position.
As a remainder beneficiary, the State may receive up to the total amount of medical assistance paid on behalf of the individual, including both long term care services and community services. Under the new section 1917(e) (see section I.B. above) the State must notify the issuer of the annuity of the State's right as the preferred remainder beneficiary. The State should require verification from the issuer that the State is named as a remainder beneficiary in the correct position. States should also require the issuer to notify the State if and when there is any change in the amount of income or principal being withdrawn.

If the State is not named as a remainder beneficiary in the correct position, the purchase of the annuity will be considered a transfer for less than fair market value. We interpret the statute to mean that the full purchase value of the annuity will be considered the amount transferred. (emphasis in original text)
Sections 6011 and 6016, New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005, July 27, 2006, Centers for Medicare and Medicaid

The Maryland MA Manual tracks the same language as the federal law and policy:

(a) Federal Deficit Reduction Act of 2005 - Requirements for Annuities

The following policies from the federal Deficit Reduction Act of 2005 apply to an annuity (or similar financial instrument specified by the Centers for Medicare and Medicaid Services (CMS)) that is purchased on or after February 8, 2006 and is reviewed for a determination or redetermination on or after April 1, 2007 of an institutionalized individual's eligibility (including an SSI recipient) for long-term care (LTC) services in a:

Nursing facility (NF);
Medical institution with a level of care (LOC) equivalent to NF; or
Home and community-based services (HCBS) waiver.

1) By virtue of applying for and receiving the above long-term care services, an institutionalized individual is considered to agree that the State of Maryland is the remainder beneficiary in the preferred position specified below for any annuity (or similar financial instrument specified by CMS):

For which the institutionalized individual or the individual's community spouse has an ownership interest; and

Which was purchased on or after February 8, 2006, with the institutionalized individual's or community spouse's assets; and

Which is reviewed for a determination or redetermination on or after April 1, 2007, of the institutionalized individual's eligibility for nursing facility or HCBS waiver services.

The State of Maryland must be named as the remainder beneficiary in the position after only the individual's community spouse and/or the institutionalized individual's child who is younger than 21 years old or disabled (as determined by the Social Security Administration or the State), for the total amount of Medicaid payments (not just the LTC payments) on the institutionalized individual's behalf. The annuity's terms must also specify that the State is named in the first position if the community spouse, the child, or the representative disposes of the remainder for less than fair market value.

The only federal purpose in naming something a "transfer for less than fair market value" is to essentially void the transfer and consider the asset in its original form, i.e. an IRA, instead of its transferred form, an annuity. Since this thwarts the entire purpose of the transfer, i.e. to convert a resource into income, in a general sense it can be called a "penalty." But this should not be confused with the "imposition of a penalty period."

The rules for transfers and penalties are extensive and not every transfer for less than fair market value results in a penalty period. That depends on the type of asset transferred and when it was transferred. Also, the penalty is based on the uncompensated value of the transfer. The CM in this case determined that the Annuity was income and as such, not a resource. Because the Annuity was not considered a resource, its "transfer" did not result in a penalty in this case.

The treatment of trusts and annuities that fail to name the State as a beneficiary in this manner is not new and has been in the law for many years, *See*, COMAR 10.09.24.08C, Special Need Trusts, MA Manual 800.14, 16, 17.

Federal guidelines like state Medicaid transmittals, although not a statute or a regulation, are entitled to deference by the courts as long as they are "consistent with the plain language and purposes of the statute and if [it is] consistent with prior administrative views." *Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir. 1999).[1] Maryland cannot adopt a regulation that conflicts with federal law. COMAR has not been updated since the enactment of the DRA and contains numerous outdated provisions, particularly with respect to assets, annuities, transfers of resources and the look back period.

The important issue is not what is in COMAR, but whether the procedures the state has adopted conform with the federal law. Just as the state is bound by federal statute, it is bound by the federal interpretation of that statute. The MA manual, like COMAR, is available to the public on line and is the de facto COMAR with respect to long term care.

[1] In 2012, the 9th Circuit confirmed that that provision permits a state to recover against a Community Spouse's Annuity for Medicaid costs paid for an Institutionalized Spouse. The court held that nothing in this statutory language was inconsistent with permitting a state to recover from the annuity for expenses incurred after the community spouse's death. *See, Hutchinson v Arizona Health Care Cost Containment System Admin.* No. 10-16426, 2012 U.S. App LEXIS 1491 (Jan. 27, 2012).

The Annuity in this case names the Appellant as the owner of the Annuity as well as the annuitant and his wife, as the community spouse, the beneficiary along with the State of Maryland as the first contingent beneficiary up to the amount of MA benefits provided to the Appellant under 42 U.S.C. 1396p(c)(1)(F)(I). The annuity contract calls for equal monthly payments to the Appellant's wife for a period of five years and is totally irrevocable and non-transferrable. In addition, 42 U.S.C. 1396r-5(c)(2) provides that the resource allocation is to be determined at the time of application for benefits. In this case, the Appellant's application was filed on October 18, 2013 and at that time, he had already purchased the annuity at issue in this case. As such, the annuity complied with 42 U.S.C. 1390p(c)(1)(G) and cannot be considered an asset. While the annuity itself cannot be considered an asset, the monthly payments could, depending on whether they are considered income or a resource. Income, per 42 U.S.C. 1382a includes earned and unearned income and annuity payments are considered unearned income. 42 U.S.C. 1382a(a)(2)(B) The payments in this case, therefore should be considered income, not resources. Under 42 U.S.C. 1396r-5 provides that only the income of the institutionalized spouse is considered in considering his MA eligibility. Here, the payments are made to the Appellant's wife, the primary beneficiary, and as such cannot be considered as income or resources to the Appellant by the local department. 42 U.S.C. 1396r-5.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the local department improperly characterized the Appellant's annuity as available income to the Appellant. 42 U.S.C. 1390, 42 U.S.C. 1396p, r-5, and COMAR 10.09.24.04.

ORDER

Having found that the decision of the local department that the Appellant is eligible for Medical Assistance, Long Term Care benefits, after considering the annuity payments as countable income to the Appellant was incorrect.

I ORDER that this case be **REVERSED and REMANDED** to the local department to determine the proper Medical Assistance, Long Term Care benefit eligibility amount without counting the payments of the annuity as countable income to the Appellant.

IT IS FURTHER ORDERED that the Appellant retains the right to appeal the local department's decision with respect to the revised benefit amount.

July 3, 2014
Date Decision Mailed

Michael J. Wallace
Michael J. Wallace
Administrative Law Judge

MJW/tc
#150199

REVIEW RIGHTS

This case is being returned, or remanded, to the local department with instructions to make an eligibility determination. This decision is final and binding upon the local department of social services. If you, the Appellant, disagree with the ALJ's decision to return the case to the local department, you may file an appeal with the Board of Review of the Department of Health and Mental Hygiene, within 30 days of receipt of this decision. To do so, you must write to the Secretary of the Board of Review, Department of Health & Mental Hygiene, 201 West Preston Street, Baltimore, MD 21201. COMAR 10.01.04.08C; COMAR 10.01.05. If you agree with the ALJ's decision to return the case, you may wait for the determination of eligibility that the local department will make before filing an appeal. Should you disagree with the local department's determination on the application, you may file a new appeal. COMAR 10.01.04; 10.01.05.

The Office of Administrative Hearings is not a party to any review process.

Copies mailed to:

[redacted]
c/o [redacted]

[redacted], Esquire
[redacted]

Leslie Slaby, Appeal Coordinator
Frederick County DSS
100 East All Saints St.
Frederick, MD 21701

Katie White, Appeal Coordinator
Frederick County DSS
100 East All Saints St.
Frederick, MD 21701

Marie McLendon
Office of Eligibility Services
Department of Health and Mental Hygiene
201 West Preston Street, Room L-9
Baltimore, MD 21201

Sabrina Blackburn, Paralegal
Office of the Attorney General
300 West Preston Street, Room 302
Baltimore, MD 21201

Cynthia Carpenter, Director
Bureau of Disability Services Operations
Department of Human Resources
311 West Saratoga Street
Baltimore, MD 21201-3521