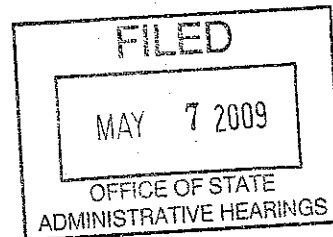


BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

INEZ HARBIN,	)	
Petitioner,	)	Docket No.
v.	)	OSAH-DFCS-ABDR-0925682-144-AK
	)	
DEPARTMENT OF HUMAN	)	Agency Reference No. 757433906
RESOURCES, DIVISION OF FAMILY	)	
AND CHILDREN SERVICES,	)	
Respondent.	)	
_____	)	



**INITIAL DECISION**

**I. Introduction**

Petitioner requested administrative review of Respondent's adverse action imposing a transfer of resource penalty, which resulted in no vendor payments being issued from November 2008, through April 2010. A hearing was held on April 22, 2009. Petitioner was represented by Joel Kevin Tharpe, Esq. Respondent was represented by Barbara Watkins with Union County Department of Family and Children Services. Petitioner submitted a Brief in Support of Petitioner's Appeal for Administrative Review on the day of the hearing. Respondent was afforded ten (10) days to file a response if so desired. Ten days have passed since the date of the hearing and no response to the brief has been received. After reviewing the record and relevant authority, Respondent's adverse action is **REVERSED**.

**II. Findings of Fact**

1.

Petitioner is a 95-year-old single female who resides at Union County Nursing Home in Blairsville, Georgia. She entered the nursing home on September 8, 2008. Subsequently, Petitioner submitted an application for Nursing Home Medicaid on December 15, 2008, through the Union County Department of Family and Children Services office seeking Medicaid benefits retroactive to November 1, 2008. Respondent approved the application on March 6, 2009. However, Respondent imposed a Transfer of Resource penalty and denied vendor payments to Union County Nursing Home from November 1, 2008, through April 1, 2010, as a result. The Transfer of Resource penalty was imposed due to the fact that Petitioner had purchased an annuity in October 2008, and had refused to name the State of Georgia as a beneficiary.

2.

At the time of her Medicaid application, Petitioner had total assets equaling \$6,500.00, which included a checking account balance of \$1,000.00; and three life insurance policies worth a total value of \$5,500.00. Under Georgia Medicaid Policy, all of the assets are excludable, non-countable resources.

3.

At the time Petitioner's Medicaid application was processed, her gross monthly income was \$2,893.81, which included Social Security benefits of \$465.40, Civil Service Pension benefits of \$780.00, and monthly payments of \$1,648.41 from an irrevocable, non-assignable, actuarially sound immediate annuity with Lincoln National Life Insurance Company (Annuity). The Annuity was purchased on October 6, 2008 with a single premium payment of \$83,500.00. As noted above, it is irrevocable and non-assignable. It is also actuarially sound and provides for immediate payments in equal monthly amounts during the term of the annuity, with no deferral and no balloon payments. More specifically, the annuity provides for 52 monthly payments of \$1,648.41 beginning November 2008. Petitioner's daughter and two sons are the named beneficiaries of the annuity.

4.

As Petitioner's gross monthly income exceeded the Medicaid Cap, she established a Qualified Income Trust and opened a bank account in the name of the QIT at United Community Bank on or about October 14, 2008, which was fully funded as of November 1, 2008. Petitioner's income that exceeds the Medicaid Cap is placed in the QIT on a monthly basis and is then used to help pay Petitioner's Patient Liability Cost.

### III. Conclusions Of Law

1.

Nursing Home Medicaid is a class of assistance that provides benefits to eligible individuals residing in a Medicaid-participating nursing home. An applicant or recipient is eligible for such benefits when basic and financial eligibility criteria regarding income and resources are met. *Georgia Department of Human Resources Economic Support Services Manual (ESSM)*, § 2141.

2.

The issue in this matter is whether Respondent correctly determined that a transfer of resource penalty can be applied based on Petitioner's purchase of a Single Premium Immediate annuity that is irrevocable, non-assignable, and actuarially sound, but which does not name the State of Georgia as beneficiary.

3.

Georgia Medicaid Policy, adopted February 1, 2007, provides:

Effective with annuities purchased on or after 2/8/06, for [applicant/recipients] applying for or already receiving [Nursing Home] Medicaid, the State of Georgia must be named as the remainder beneficiary of the annuity in the first position for the total amount of medical assistance paid on behalf of the individual receiving [Nursing Home] Medicaid.

ESSM § 2339.<sup>1</sup>

<sup>1</sup> The only exception to the above policy is if there is a community spouse and/or minor or disabled child, the State of Georgia may be named in the next position after those individuals. ESSM § 2339. There is no evidence that Petitioner has a community spouse and/or minor or disabled child, thus the exception is inapplicable in this matter.

4.

Likewise, federal law at 42 U.S.C. § 1396p(c)(1)(F) provides:

. . . the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless—(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this title [42 USCS §§ 1396 et seq];

5.

Respondent asserts that failure to name the State of Georgia as the remainder beneficiary will result in a transfer of asset penalty being imposed against Petitioner under Georgia Medicaid Policy Sections 2339 and 2342.

6.

Petitioner argues, however, that the provision requiring that she name the State as a beneficiary of her annuity applies only to annuities that are considered “assets” and that, under federal law, her Single Premium Immediate Annuity is not an “asset.” Specifically, federal law at 42 U.S.C. § 1396p(c)(1)(G) provides

. . . with respect to a transfer of assets, the term “assets” includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services . . . unless—(ii) the annuity—(I) is irrevocable and nonassignable; (II) is actuarially sound . . . (III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

7.

Petitioner correctly asserts that her Single Premium Immediate Annuity is not an asset with respect to transfers of assets because it is irrevocable and nonassignable, as well as actuarially sound, and provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments. Inasmuch as the annuity is not an asset because it meets the above-referenced criteria, Respondent may not impose a transfer of resource penalty. However, as Respondent’s policy provides, it can treat the monthly payments Petitioner receives as income in determining her Medicaid eligibility and Patient Liability Cost. Respondent’s policy, in fact, provides that the monthly payments count as income. In this matter, because the monies in dispute cannot be both income and an asset, Respondent has chosen to not count the monthly payments as income because a transfer penalty of approximately 18 months has been imposed and if the monthly payments were treated as income for the full 52 months that payments are expected to be issued, it would effectively penalize Petitioner twice in connection with the same monies, that being the \$83,500.00 used to purchase the annuity. Respondent’s policy does not, however, specifically allow for the monthly payments to not be counted as income. Instead, this provision providing that the monthly payments be counted as income is consistent with a conclusion that an annuity that meets the specified criteria

of 42 U.S.C. § 1396p(c)(1)(G) it is not an asset, but rather should be treated as income, which treatment would increase Petitioner's Patient Liability Cost.

8.

In addition to not being able to impose a transfer of resource penalty because the annuity is not an "asset" for transfer of asset purposes under Medicaid policy, the provision requiring that she name the State of Georgia as the remainder beneficiary is inapplicable, as that provision refers to treating the purchase of the annuity as the disposal of an "asset," which Petitioner's annuity is not.

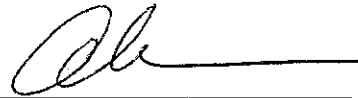
9.

Based on the foregoing, Petitioner is not required to name the State of Georgia as the remainder beneficiary for the annuity she purchased in October 2008 because it falls outside the definition of "assets." Inasmuch as Petitioner is not required to name the State of Georgia as the remainder beneficiary, Respondent should not have imposed a Transfer of Resource penalty based on her failure to do so.

#### IV. Decision

Respondent's adverse action imposing a Transfer of Resource penalty in connection with Petitioner's purchase of a Single Premium Immediate Annuity that is irrevocable, non-assignable, and actuarially sound is **REVERSED**.

This 7<sup>th</sup> day of May 2009.



**Ana Kennedy**  
**Administrative Law Judge**