



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.C.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 15248-2015
AND HEALTH SERVICES AND	:	
BURLINGTON COUNTY BOARD OF	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the case file and the documents in evidence. Neither party filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is April 27, 2017 in accordance with an Order of Extension.

This matter concerns Petitioner's eligibility date. Petitioner applied for benefits in January 2015. He died on March 27, 2015. Burlington County found him eligible as of March 1, 2015. Petitioner is seeking an eligibility date of February 1, 2015. At issue is the availability of \$220,000 Petitioner's wife used to purchase an annuity. When she wrote the check to purchase the annuity on January 26, 2015, she also signed a waiver of the 10 day revocability period. Petitioner claims this prevented her from accessing the \$220,000 in funds in order to claim eligibility as of February 1, 2015.

The Initial Decision found that the waiver prevented her from accessing funds used to purchase the annuity so as to reduce her countable assets. However, the record contains no evidence to support this finding. The Initial Decision's found that the "Vice President of Phoenix Life Insurance Company provided a letter to counsel for the petitioner which states, in relevant part, that it is the [annuity] company's 'policy to honor a waiver of the ten-day free look-back to the extent it is not barred by State law.'" ID at 4. There is no letter from Phoenix in the case file. Moreover, the internal quote above is quoted from Petitioner's brief. P-1. There is no evidence that such a statement was made by a Vice President of Phoenix Life Insurance Company.

There are three emails in the record that discuss a waiver. Two of the emails are dated from 2013 and are a conversation between two individuals not associated with this case. P-6. The third email is address to Petitioner's counsel's email address and merely states that there was a waiver document in the annuity file. As hearsay documents, they cannot be used to support a finding of fact. A finding of fact based on hearsay must be supported by competent

evidence. N.J.A.C. 1:1-15.5(b), the **residuum rule**, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." Putting aside that the emails are hearsay and there is no foundation to enter them into evidence, there is no competent legal evidence that the waiver signed by Petitioner's wife was honored.

Moreover, the general rule about waiving a statutory provision should be reviewed in light of the public interest concerns associated with Medicaid applicants. Indeed the quote from Magna Mfg. Co. v. Aetna Casualty & Sur. Co., 129 N.J. Eq. 142 in the Initial Decision fails to include the rest of the sentence. The full sentence reads "[a] party can waive a statutory provision intended for his benefit, and not involving considerations of public policy. (citation omitted)". (Emphasis added). Annuities are governed by state law and are heavily regulated. To that end all annuity contracts are required to include "provisions or has attached to it a notice stating that during a period of not less than 10 days after the date the initial owner receives the annuity, the owner may cancel the annuity and receive from the insurer a prompt refund of any account value of the annuity, including any contract fees or other charges, by mailing or otherwise surrendering the annuity together with a written request for cancellation." N.J.A.C. 17B:25-39. Sellers of annuities must also "make reasonable efforts to obtain and record information about the suitability of the product for the solicited consumer and the consumer's acknowledgement of the information recorded." http://www.state.nj.us/dobi/bulletins/blt09_12.pdf. Indeed, the New Jersey Department of Banking and Insurance issues notices informing

consumers about their rights when purchasing an annuity. See <http://www.state.nj.us/dobi/pressreleases/pr170405.html> and <http://www.state.nj.us/dobi/pressreleases/pr140410.html>.

In E.B. v. Division of Medical Assistance and Health Services, 431 N.J. Super. 183, 199-200 (App.Div. 2013), the Appellate Division recognized the public policy considerations when dealing with the Medicaid program.

In general, and subject to other governing law, "[p]arties have a right to contract in any way they see fit." Triffin v. Bank of Am., 391 N.J. Super. 83, 89, 917 A.2d 257 (App.Div.2007) (citation omitted). However, "[i]t is well-settled that the dictates of public policy may require invalidation of private contractual arrangements where those arrangements directly contravene express legislative policy or are inconsistent with the public interest or detrimental to the common good." Sacks Realty Co., Inc. v. Shore, 317 N.J. Super. 258, 269, 721 A.2d 1011 (App.Div.1998) (emphasis added). The courts employ a balancing test that weighs the legislative policy and the public interest against the enforcement of the contractual provision in order to determine whether to void the contractual provision. Saxon Constr. & Mgmt. Corp. v. Masterclean of N.C., 273 N.J. Super. 374, 378, 641 A.2d 1129 (Law Div.1992), aff'd, 273 N.J. Super. 231, 641 A.2d 1056 (App.Div.), cert. denied, 137 N.J. 314, 645 A.2d 142 (1994); see Triffin, supra, 391 N.J. Super. at 875, 917 A.2d 257.

See also Seabrook Village v. Murphy, 371 N.J. Super. 319 (App.Div. 2004).

Thus, I FIND that the record does not contain legally competent evidence to support the Initial Decision's finding that Petitioner's wife did not have the ability to revoke the \$220,000 annuity on February 1, 2015. As such Petitioner was over resources until March 1, 2015 and remained eligible for Medicaid benefits until his death on March 27, 2015.

27th
THEREFORE, it is on this 0 day of APRIL 2017,

ORDERED:

That the Initial Decision is hereby REVERSED.



Meghan Davey, Director
Division of Medical Assistance
and Health Services