Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives
Paul R. LePage, Governor
Mary C. Mayhew, Commissioner

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TO: [redacted]
c/o Craig Stevens, Esq.
21 Western Avenue
Augusta, ME 04330

RE: Counting Irrevocable Annuity Income Towards Nursing Home Cost of Care

ADMINISTRATIVE HEARING DECISION

An administrative hearing was originally scheduled to be held on July 27, 2015. Craig Stevens, Esq., legal counsel for Ms. [redacted], requested a reschedule. The Department did not have an objection and the hearing was rescheduled for September 3, 2015. The parties then jointly requested that the date be used as a pre-hearing conference. On September 1, 2015, AAG Thomas Quinn, legal counsel for the Department, asked for a reschedule. There was no objection from Ms. [redacted], and the pre-hearing conference was rescheduled. The pre-hearing conference was held on October 27, 2015. At that pre-hearing conference, it was determined that the issue on appeal was a purely legal one, and that the parties would submit legal briefs. A series of legal briefs were scheduled. The Department was to submit its initial brief on November 30, 2015. Ms. [redacted] was to reply on December 15, 2015. The Department's final brief was due on December 29, 2015. All briefs were timely submitted. On January 26, 2016, the hearing officer asked the parties whether they wanted the hearing officer to rule on the admittance of expert testimony by Dale Krause, J.D, LL.M and/or the need for an evidentiary hearing prior to issuing her decision. Neither party wished the hearing officer to address the two issues before issuing the decision.

CASE BACKGROUND AND ISSUE:

Ms. [redacted] resides in a nursing home, [redacted] Longterm Care. Her husband resides in the community. Ms. [redacted] applied for long term care MaineCare to assist her with payment for her nursing home care. On May 28, 2015, DHHS sent Ms. [redacted] a cost of care letter advising her what her monthly cost of care would be towards her nursing home care. According to the letter, Ms. [redacted] was to pay $2,293.29 per month towards her cost of care in the nursing home. See DHHS-1. The income from an annuity owned by Ms. [redacted] was included in this cost of care. Ms. [redacted] did not agree that the annuity income should be included in calculating her cost of care.

Issue: Was DHHS correct when it sought to count annuity income towards Ms. [redacted] cost of care.

APPEARING ON BEHALF OF CLAIMANT:

Craig Stevens, Esq.

APPEARING ON BEHALF OF AGENCY:
Thomas Quinn, AAG

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:
HO-1 Scheduling Notices and requests for rescheduling
HO-2 Fair Hearing Report Form dated June 10, 2015
HO-3 Letter from hearing officer to parties dated September 10, 2015
HO-4 Brief Schedule dated October 27, 2015

Department's exhibits:
DHHS-1 Cost of Care Memo dated May 28, 2015
DHHS-2 Department's Initial brief dated November 30, 2015 with attachments
- A. Annuity Contract
- B. Letter from Krause Financial Services to Stephanie Nadeau dated November 9, 2015

DHHS-3 DHHS Brief dated December 30, 2015

Claimant's exhibits:
Marston-1 Memorandum of Case dated August 24, 2015 with attachments:
- A. Annuity Contract
- B. Check from Annuity to Mr. [redacted] dated January 5, 2015 Part 14, §5, MaineCare Eligibility Manual
- C. Part 16, §2.3, MaineCare Eligibility Manual

Marston-2 Second Memorandum dated December 15, 2015

FINDINGS OF FACT:

1. [redacted] purchased an annuity issued by ELCO Mutual Life and Annuity on or about December 24, 2014.
2. Ms. [redacted] is the annuitant.
3. The single initial premium paid totaled $80,628.93.
4. The annuity was effective December 23, 2014.
5. The annuity pays $2,259,29 in gross income each month.
6. The annuity designates [redacted], Ms. [redacted] husband, as the irrevocable payee and sole recipient of the income from the annuity.
7. Ms. [redacted] funded the annuity in question from funds from an existing IRA in her name.
8. She then automatically transferred the funds to the new ELCO IRA with 'annuity inside'.

DECISION:

The Department improperly counted the annuity income toward the cost of [redacted]'s cost of care.

REASON FOR DECISION:

The basic facts of this case are not in dispute. [redacted] owns an annuity issued by ELCO Mutual Life and Annuity. Ms. [redacted] is the annuitant. The single initial premium paid totaled $80,628.93.The annuity was effective December 23, 2014. The annuity pays $2,259,29 in gross income each month. The annuity designates [redacted], Ms. [redacted]'s husband, as the irrevocable payee and sole recipient of the income from the annuity.
Residents of nursing homes who apply for MaineCare coverage are expected to pay at least a portion of their care with their available resources. When and if MaineCare determines that a resident is capable of paying for a portion, the resident is sent a 'cost of care' letter explaining what the monthly cost of care will be. According to the MaineCare Benefits Manual,

> ***The individual's cost of care is what the individual is expected to pay towards the cost of their care at the institution. The cost of care is determined by considering the individual's income minus certain expenses and the Community Spouse Monthly Income Allocation. See Part 14, § 6.1***

In Ms. [redacted]s case, the Department determined that her monthly cost of care would be $2,293.29 See DHHS-1. There is no dispute that, in calculating Ms. [redacted]'s monthly cost of care, the Department included monthly income from an annuity owned by Ms. [redacted]. Ms. [redacted] appealed the cost of care because Ms. [redacted] had determined that the MaineCare rules allow her to exempt the income from this annuity from any calculation of her nursing home cost of care. According to Ms. [redacted], even though she is the owner of the annuity, the income belongs solely to her husband. Therefore, it cannot be used as available income to her towards her nursing home cost of care.

The Department argues that, to exclude the annuity, from available income for Ms. [redacted], contradicts MaineCare policy. In addition, the Department argues that to exclude the annuity income from the calculation of Ms. [redacted]s cost of care would render federal and state spousal impoverishment legislation irrelevant. Such laws and regulations insure that the community spouse is not left destitute because of the institutionalized spouses cost of care. These rules provide for a certain amount of income to be kept by the community spouse in order to live in the community. Here, according to the Department, Ms. [redacted] simply diverted a stream of income to her husband, and is forcing MaineCare to pay for a larger portion of her care.

The parties agree that there are two distinct provisions of the MaineCare Eligibility Manual that are relevant to this case. The first is Part 14, §5.1 which addresses the ownership of income when there is an institutionalized spouse and a community spouse.

According to that provision,

> ***Section 5.1: Income Ownership***
>
> ***The income ownership rules for purposes of this Part supersede any State laws relating to community property or the division of marital property. The rules of ownership of income are as follows:***
> ***I. Income payments made solely in the name of one spouse are available only to that respective spouse.***

The other provision is Part 16 §2.3[1] in regards to the treatment of annuities. The rules dictate that unless an annuity meets specific criteria it will be a countable resource for the institutionalized spouse or will count as an impermissible transfer of assets,

A. Policy applicable to all MaineCare including residential care and long term care
An annuity may be purchased by the individual or a third party. If the annuity is purchased by other than the individual, the payments are counted as income. There is no countable resource nor is there a transfer of assets.[2]
(2) Annuities Purchased on or after 2/8/06
(a) Payments from annuities are considered income to the individual for whom the payments are designated.
(b) The current cash value of the annuity available to the individual including the principal and interest earned on the principal minus any penalty fees for withdrawal is a countable resource.

B. Policy applicable to long term care –

Applicants for and recipients of Medicaid long term care or residential care coverage must disclose a description of any interest the individual or community spouse has in an annuity regardless of whether the annuity is irrevocable or is treated as an asset. This must be disclosed at the time of initial application and at re-determination.
(2) Annuities Purchased on or after 2/8/06

(a) An annuity purchased by or on behalf of an annuitant who has applied for Medicaid with respect to long term care services will be treated as a transfer of assets unless:
(i)the annuity is an Individual Retirement Annuity (26 U.S.C. §408(b,q); or
(ii)the annuity is purchased with proceeds from

an Individual Retirement Account or a simple retirement account (26 U.S.C. §408(a), (c), or (p) ; a simplified employee pension (26 U.S.C. §408(k); or a Roth IRA (26 U.S.C. §408); or

(iii)the annuity is:
irrevocable and non-assignable; and actuarially sound (as determined in the Social Security Administration Life Expectancy Table. This table can be found on the Internet at http://www.ssa.gov/OACT/STATS/table4c6.html); and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(b) The purchase of an annuity by the individual or the community spouse shall be treated as the disposal of an asset for less than fair market value unless:

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[1] Part 16.5 §4.3A, MaineCare Eligibility Manual contains the same rule.
[2] References to the provisions regarding annuitys purchased before February 8, 2006 have been excluded because those provisions are not relevant to this proceeding since the annuity in question was purchased after 2006.

(i) the State of Maine is named as the remainder beneficiary in the first position for the total amount of Medicaid paid on behalf of the individual; or

(ii) the State of Maine is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or representative of the child disposes of their remainder for less than fair market value. See Part 16.4 §4.3(A).

The Department argues that it correctly included the monthly stream of income from the annuity into Ms. [redacted]s cost of care. It argues that, to 'shield' the annuity income is contrary to the rules and would result in chaos. According to the Department, if Ms. [redacted]'s argument was to be upheld then there would be nothing to prevent an institutionalized spouse from transferring their income to the community spouse, leaving Medicaid liable for the entirety of the nursing home cost. The Department asserts that Ms. [redacted] is 'cherry picking' isolated provisions of MaineCare policy instead of looking at the legislative intent and the MaineCare program as a whole. According to the Department, a basic tenet of Medicaid policy is that it is the payor of last resort.

> ***"Congress wanted Medicaid to be a "payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S.Rep. No. 99-146, at 312 (1985), reprinted in 1986 U.S.C.C.A.N. Ahlborn v. Arkansas Dept. of Human Services, 397 F.3d 620, 623 (8th Cir. 2005) aff'd sub nom. Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006)***

By not counting the annuity income, the Department claims that this basic tenet is contradicted, as Ms. [redacted] is not using all of her available assets and income, prior to accepting MaineCare Long Term Care benefits. Accepting Ms. [redacted] position, would, in the words of the Department, 'make a mockery of that principle'. See DHHS-1.

The Department also argues that that the 'spousal impoverishment' laws would be rendered useless if Ms. [redacted] position is upheld. In 1988, Congress enacted provisions to prevent the impoverishment of spouses of nursing home residents. Under the Medicaid spousal impoverishment provisions, a certain amount of the couple's combined resources is protected for the spouse living in the community. Depending on how much of his or her own income the community spouse actually has, a certain amount of income belonging to the spouse in the institution can also be set aside for the community spouse's use. In Maine, this rule is found under Part 14, §4.3.. MaineCare Eligibility Manual.

> ***When an institutionalized individual has a community spouse, the couple's assets are looked at under special rules. These special rules determine how much of the couples assets are attributed to the community spouse and the institutionalized spouse. The amount attributed to the community spouse is called the Community Spouse Asset Allowance. The amount attributed to the institutionalized spouse is an available asset for the individual.***

According to the Department, an institutionalized spouse could simply transfer the asset then there would be no need for the spousal impoverishment rules.

The Department asserts that the income ownership rules need to be read in their entirety to accurately understand the intent. According to the Department, Part 14, §5.1 must be read in its entirety,

> ***The income ownership rules for purposes of this Part supersede any State laws relating to community property or the division of marital property. The rules of ownership of income are as follows:***
>
> ***I. Income payments made solely in the name of one spouse are available only to that respective spouse.***

The Department writes,

> ***"The intent of this rule, as revealed in the introductory paragraph, is to ensure that the separate income streams owned by both the community spouse and the institutionalized spouse be recognized and maintained as separate entitlements. Therefore, for example, despite whatever other rules (such as community or marital property standards) might otherwise suggest, a pension owned by a community spouse may not be deemed to be available to the institutionalized spouse...this is one of several rules designed to prevent the impoverishment of the community spouse. However, it is worth noting, if the petitioner's interpretation were correct this very provision would be pointless. In a world in which petitioner's view of the system prevails, there is no limitation on the type or amount of income that can be transferred by the institutionalized spouse to a community spouse, merely by 'designating' that income to them as 'payee'." See DHHS-1.***

The Department also argues that the provision in the MaineCare Eligibility Manual governing annuities does not support Ms. [redacted]s position that the income belongs to her husband. The provision reads,

> ***Payments from annuities are considered income to the individual for whom the payments are designated. See Part 16.5 §4.3A(2)(a), MaineCare Eligibility Manual.***

The Department argues that this provision does not mean that the payments belong to Mr. [redacted] as argued by Ms. [redacted] since Mr. [redacted] is the irrevocable payee of the annuity. Rather, the Department argues that a more reasonable interpretation is that the person designated is the owner and the annuitant of the annuity. In this case Ms. [redacted] is both the owner and the annuitant.

The Department also looks to the annuity contract to support its interpretation. The Endorsement portion of the annuity contract states that,

> ***11. Exclusive Benefit.***
> ***The Contract is established for the exclusive benefit of the owner or his or her beneficiaries. See [redacted]-1, Exhibit A.***

The Department argues that Ms. [redacted] is the owner, and nowhere in the clause does it speak of the 'irrevocable payee' (which is Mr. [redacted]). Therefore, it is for the exclusive benefit of Ms. [redacted]. In addition, the Department argues that a beneficiary cannot benefit from an annuity until

the owner's death. So as long as she is alive, the income must be used for the exclusive benefit of Ms. [redacted], and thus should be considered income to her.

Lastly, the Department argues that the language of the annuity contract reveals that Ms. [redacted] is the individual to whom the distribution is made. According to the contract,

> ***it (a distribution) is taxed to the person receiving the distribution as ordinary income. See [redacted]-1, Attachment A.***

According to the Department since, Ms. [redacted] concedes that the income distributed from the annuity is taxable to her, she must be the person to whom the income is distributed,

> ***"At the same time, mysteriously, petitioner contends that while she is 'receiving the distribution' and while it is assuredly income to her for federal tax purposes, it cannot be consider as income to her for purposes of MaineCare 'cost of care' calculations. This alchemistic miracle stems solely from the overly simplistic, context-free interpretations of the two sentences described above." See DHHS-2.***

Ms. [redacted] responds that taxation does not equals ownership. According to Ms. [redacted] taxation in the tax code does not determine ownership. Ms. [redacted] gives the example that if person A gives person B $25,000.00.00, A pays the gift tax even though person B is free to use the money anyway she sees fit. In this example the IRS does not equate ownership with taxation. Person B now owns the $25,000,000.00 but Person A owes the tax.

Furthermore, according to Ms. [redacted],

> ***"We should not be looking to the tax code, the social security code or any other code for our definition or meaning. Our definition of 'income ownership' and how to treat 'payments from annuities' is right there – in Part 14 and Part 16.5 of the MaineCare Eligibility Manual, clear as day." See Marston-2.***

The hearing officer agrees that the Department's argument that, since Ms. [redacted] will be taxed on the distribution means that the annuity income is hers is incorrect. The hearing officer agrees that with Ms. [redacted] that there is no need to look at the tax code for answers, and in fact taxation does not equate with ownership.

Ms. [redacted] argues that the Manual citations are clear and unambiguous, and therefore there is no need to investigate the legislative intent. According to Ms. [redacted], MaineCare policy supports her position that the annuity income should not be included in her cost of care. Ms. [redacted], in response to the Department's citation, provides its own canon of statutory interpretation. According to Ms. [redacted], the Maine Law Court has consistently held that when the statutory language is unambiguous, there is no need to look at other indicia of legislative intent. Citing *Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, ¶ 18, 745 A.2d 387, 392,

> ***"We have set forth the general rules for statutory construction as follows: We look first to the plain meaning of the statutory language as a means of effecting the legislative intent. Where the statutory language is ambiguous, we examine other indicia of legislative intent, such as legislative history. The statutory scheme from which the***

language arises must be interpreted to achieve a harmonious outcome. We will not construe statutory language to effect absurd, illogical, or inconsistent results.Coker v. City of Lewiston, 1998 ME 93, ¶ 7, 710 A.2d 909, 910 (citations omitted). " 'If the meaning of this language is plain, we must interpret the statute to mean exactly what it says.' " Rowe v. Chapman Trucking, 629 A.2d 1224, 1226 (Me.1993) (quoting Concord Gen. Mut. Ins. Co. v. Patrons Oxford Mut. Ins. Co., 411 A.2d 1017, 1020 (Me.1980)). Stated succinctly, when the language chosen by the Legislature is clear and without ambiguity, it is not the role of the court to look behind those clear words in order to ascertain what the court may conclude was the Legislature's intent." See Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 18, 745 A.2d 387, 392

Ms. [redacted] responds to the Department's contention that she is 'cherry picking' the rules by asserting that the Department has not offered any other rules that would be implicated in this case.

Ms. [redacted] also responds to the Department's argument that the exclusion of the annuity income from the cost of care calculation breaks the basic tenet that Medicaid is the payor of last resort. Ms. [redacted] cites the same case as the Department did in its assertion of this rule, *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). In Ahlborn, the State of Arkansas sought reimbursement for medical care provided to Ms. Ahlborn from a settlement agreement. The Court found that, even though Congress intended Medicaid as the payor of last resort, it could not do so if such a claim broke federal law. Instead, the court found that the State of Arkansas was able to recoup what it spent on medical care for Ms. Ahlborn, but was prevented by federal law from forcing Ms. Ahlborn from assigning the entirety of her settlement,

"In the end, we are left with a federal statutory scheme that clearly requires Ahlborn to assign her rights to recover from third parties for the costs of medical care and services incurred as a result of their tortious conduct, but protects all of Ahlborn's nonassigned property from recovery by the State through the anti-lien statute. The Arkansas statutes requiring Ahlborn to assign her entire cause of action against the third-party tortfeasors, and establishing a statutory lien on settlement proceeds for matters other than medical care and services, conflict with and frustrate this federal scheme. See Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)." See Ahlborn v. Arkansas Dept. of Human Services, 397 F.3d 620, 628 (8th Cir. 2005) aff'd sub nom. Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006)

Ms. [redacted] relies on this case for the premise that the payor of last resort tenet is not without its boundaries, and cannot be used, in this case, to argue for the inclusion of the annuity income.

Ms. [redacted] argues that the rules allow for couples to create income with the use of annuities, provided that the annuity abides by those rules. According to Ms. [redacted], this is true in this case.

In response to the Department's argument that Ms. [redacted] is 'diverting' her annuity income to her husband, Ms. [redacted] asserts that, due to the characteristics of the annuity, the annuity income was never hers to begin with. According to Ms. [redacted],

"There is no need to torture the language of the MaineCare Eligibility Manual to avoid the nightmare scenarios that the Department fears. These scenarios cannot occur. Through the Department's Memorandum, the Department covers various scenarios that

fail to recognize that annuities are unique financial products and that the income from annuities is different from many other forms of income. Most (if not all) of the Department's alarmist scenarios involve an institutionalized spouse taking his or her income and 'diverting' it to the community spouse (without remembering that such a transaction must first pass the test outline in Part 14, 'income ownership'). This is not how an annuity works. An annuity, at its inception, directs income to an individual per the terms of the contract."

According to Ms. [redacted], she funded the annuity at issue with funds from an existing IRA. She created an IRA at ELCO Mutual Life & Annuity Company, transferred her existing IRA funds directly into a new ELCO IRA and then purchased the present ELCO annuity 'inside' that new ELCO IRA.

The hearing officer has determined that the Department incorrectly included the income from the annuity when calculating Ms. [redacted]s cost of care. This is because the annuity in question meets the criteria, under the rules, to neither be counted as an available resource for Ms. [redacted] nor counted as an impermissible transfer of assets. The annuity also meets the ownership rules.

According to Part 14 §5.1,

Income payments made solely in the name of one spouse are available only to that respective spouse.

Here the annuity designates Mr. [redacted] as the beneficiary and the irrevocable payee. See [redacted]-1, attachment A. The income payments are made solely in his name. The monthly checks are made out to Mr. [redacted]. See [redacted]-1, attachment B. The hearing officer does not agree that this rule should be interpreted to name Ms. [redacted] as the designated spouse. Ms. [redacted] is correct that the plain reading of the rule is to name Mr. [redacted] as the 'owner' of the annuity income.

The hearing officer also agrees with Ms. [redacted] that the scenarios envisioned by the Department where institutionalized spouses would be permitted to assign their income to the community spouse, leaving MaineCare liable for the entirety of the cost of care is not the case here. The hearing officer agrees that the annuity income was never hers to begin with, she has not defied the rules by 'diverting' the income to her husband.

Under the rules governing annuities, applicants for and recipients of must disclose a description of any interest the individual or community spouse has in an annuity regardless of whether the annuity is irrevocable or is treated as an asset. This must be disclosed at the time of initial application and at re-determination. See 16.5 §4.3A(2)(B), MaineCare Eligibility Manual. In this case, Ms. [redacted] disclosed the annuity since the Department used it in calculating her cost of care.

The rule then prescribes what criteria must be met to not be counted as an impermissible transfer of assets. According to the rule,

An annuity purchased by or on behalf of an annuitant who has applied for Medicaid with respect to long term care services will be treated as a transfer of assets unless:
(i)the annuity is an Individual Retirement Annuity (26 U.S.C. §408(b,q); or
(ii)the annuity is purchased with proceeds from an Individual Retirement Account or a simple retirement account (26 U.S.C. §408(a), (c), or (p) ; a simplified employee pension

(26 U.S.C. §408(k); or a Roth IRA (26 U.S.C. §408); or (iii)the annuity is: irrevocable and non-assignable; and actuarially sound (as determined in the Social Security Administration Life Expectancy Table. This table can be found on the internet at http://www.ssa.gov/OACT/STATS/table4c6.html) and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made. See Part 16.5, §4.3(B)(2)(a).

The annuity in question actually meets both subsections (i) and (iii). According to Ms. [redacted], and not disputed by the Department, Ms. [redacted] funded the annuity from an existing IRA. Additionally, the annuity is both irrevocable and non-assignable. According to the contract, the contract is irrevocable. According to the general provisions of the contract,

This contract is irrevocable. It may not be transferred, assigned, surrendered or commuted during Your lifetime. This contact has no cash or loan value. Neither the Annuitant nor the Beneficiary may be changed. See [redacted]-1, attachment A.

The annuity is also non-assignable. According to the general provisions of the contract,

Assignment. In order to satisfy applicable federal laws and regulations, this contract shall not be assigned to another person or entity. See [redacted]-1, attachment A.

There are no balloon payments envisioned. Under the Single Premium Individual Immediate Annuity Application, there is no check by 'Balloon style payments'. As the application states, the payments are not deferred but started immediately. See [redacted]-1, attachment A.

The issue as to whether the annuity is 'actuarially sound' was not argued by either party.

Lastly, the annuity must name the State of Maine as the remainder beneficiary in the first position for the total amount of Medicaid paid on behalf of the individual; or State of Maine must be named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or representative of the child disposes of their remainder for less than fair market value. Otherwise the annuity will be considered an impermissible transfer of assets. See Part 16.5 §4.3(B)(b)(i) and (ii).

In this case the annuity in question meets the criteria of (b)(iii) as the State of Maine is named as such a beneficiary in the second position after the community spouse, Mr. [redacted]. In the contract, the contingent beneficiary after Mr. [redacted] is,

State of Maine-Department of Health and Human services in the amount of medical assistance paid on behalf of the individual, namely [redacted]. See [redacted]-1, attachment A.

The hearing officer has determined that Ms. [redacted] is correct that the Department improperly counted the income from the annuity into her cost of care. The hearing officer agrees that the Department's argument fails to consider the unique nature of an annuity. The Department's assertions that to allow Ms. [redacted] to exclude the annuity income would mean that institutionalizes spouses could divert any number of kinds of income to the community spouse without penalty

including social security income and pension income is unfounded. The rules prevent such types of scenarios.

Ms. [redacted] explains that the annuity is not like other assets, and are commonly used for estate planning,

> *"In fact, this planning is the same thing that is taking place in Maine and across the country every day without objection – couples are funding MaineCare compliant annuities that satisfy the eligibility rules to produce income for the community spouse." See* [redacted]*-2.*

As Ms. [redacted] further explains,

> *"In the present case, the income from* [redacted] *'s annuity is never her income. She has not received income which she then 'diverts'. It is never her income in the first place. The income does not 'flow through'* [redacted] *and then to* [redacted] *– it is never her income.* [redacted] *is the sole, and original owner of the income. This helps illustrate why an annuity is a unique financial instrument that is not easily compared to each of the Department's scenarios." See* [redacted]*-1.*

The hearing officer agrees with Ms. [redacted] that her annuity has complied with the rules, and that the rules dictate that the annuity income should not be included in the calculation of her cost of care,

> *"In our case, in a real world example,* [redacted] *has precisely followed both the 'income ownership' rules and the rules that apply specifically to annuities. We have income payments that, from their inception, are made solely in the name of one spouse and we have income payments that designate the community spouse as the recipient. This is simply how annuities work. Congress was aware of this when these rules were drafted." See* [redacted]*-2*

Based upon the above discussion, the hearing officer has determined that the Department improperly included the annuity income when calculating Ms. [redacted] 's nursing home cost of care. The annuity in question complied with the income ownership rules as well as the rules governing annuities. See MaineCare Eligibility Manual.

The Department is directed to recalculate Ms. [redacted] s cost of care, excluding the income from the annuity.

No Need for Expert Testimony and No Need for a Hearing

The legal briefs submitted by the parties provided more than adequate legal analysis regarding the issue, for the hearing officer to make her decision. Attorney Stevens, Esq. had suggested that the hearing officer should take the testimony of an 'expert', Dale Krause, J.D, LL.M, in regards to annuities. AAG Quinn objected. Because the hearing officer found that there was no need for any testimonial evidence in this case, she will not discuss the parties opposing viewpoints on this issue.

MANUAL CITATIONS:

Part 14 Part 16, and Part 16.5, MaineCare Eligibility Manual

RIGHT OF JUDICIAL REVIEW:

ANY PERSON WHO IS DISSATISFIED WITH THE DECISION HAS THE RIGHT TO JUDICIAL REVIEW UNDER MAINE RULES OF CIVIL PROCEDURE, RULE 80C.

TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See, e.g., 42 U.S.C. section 1396a(a)(7), 22 M.R.S.A. section 42(2) and section 1828(1)(A), 42 C.F.R. section 431.304, MaineCare Benefits Manual, Ch.1, sec. 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

Date Feb 26, 2016

Miranda Benedict, Esq.
Hearing Officer

cc: Thomas Quinn, AAG