

An application was filed on Petitioner's behalf in August 2019 by Petitioner's son and Power of Attorney. Petitioner has been institutionalized in March 2019. On June 6, Petitioner's son purchased a Single Premium Immediate Annuity (SPIA) issued by the Croatian Fraternal Union of America (CFUA) for \$160,000 to pay Petitioner \$9,417.06 a month for 17 months. This amount was calculated to pay for her nursing home care while she waited out a Medicaid penalty due to transferring \$172,782 to her son. P-3. Bergen County Board of Social Services denied the Medicaid application due to the annuity being an available resource.

Edward Pazo, National President and Chief Executive Officer of the CFUA testified on Petitioner's behalf about her ability to cancel, transfer, change, assign, surrender, commute or cash out the policy. ID at 3. He was asked specifically about the circumstances in 2018 when another Medicaid applicant requested that her CFUA annuity be voided and another annuity be issued "with a different monthly payment and term for payment of benefits." M.M. v. DMAHS and Ocean County Board of Social Services, OAL Dkt, No. 1057-2019, decided June 19, 2019). Mr. Pazo described the change as based on a request by the applicant due to an "error in the calculation." TR at 65. Mr. Pazo claimed that he had the authority to comply with that request based on the clause in the annuity application that "[o]nly the National President or the National Secretary/Treasurer of the Croatian Fraternal Union of America may, in writing, make or change a contract or waive any of the rights or requirements." P-2. He further testified that since "we're merely trying to have the length of payment extended by one month we deemed it based on the interpretation [of the clause] that we could extend it." TR at 65. When questioned about the circumstances under which that clause allowed him to change or waive the rights or requirement or the annuity contract, he testified that changes were permitted to conform to "changes in some regulations or other governing laws concerning annuity contracts" by the Department of Banking and Insurance. TR. at 68. However, no part of the request by the applicant in M.M. to void one annuity and issue

another annuity was done to comply with regulations or laws governing annuities. Rather material terms of the second annuity were changed to reflect a new lump sum amount and the frequency of payments based solely on the request of the purchaser. TR at 70.

The ALJ, having heard the testimony of Mr. Pazo, concluded that the annuity purchased by Petitioner with the clause that "[o]nly the National President or the National Secretary/Treasurer of the Croatian Fraternal Union of America may, in writing, make or change a contract or waive any of the rights or requirements" permitted the annuity to be revoked so that it was a countable resource. Mr. Pazo's prior use of this clause voided a supposedly irrevocable SPIA and permitted the Medicaid applicant to have a new SPIA issued with different monthly payments and term for payment of benefits. This was all done at the request of the Medicaid applicant. It is unclear if CFUA has used this clause for other SPIAs.

In order for an annuity to be excluded, it must meet

(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 an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless—

...

(ii) the annuity—

- (I) is irrevocable and nonassignable;
- (II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and
- (III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

42 U.S.C.A. § 1396p(c)(1).

The statute does not define irrevocable. However, the subsection entitled Disclosure and Treatment of Annuities requires the disclosure of any interest the applicant or community spouse has in an annuity and describes the contrast between irrevocable annuities and those

treated as an asset. 42 U.S.C.A. § 1396p(e)(1). With those two options, it follows that an annuity that is not irrevocable is considered an asset.

Additionally, the State Medicaid Manual does provide definitions for revocable and irrevocable in the contexts of trusts. A trust is considered revocable when the grantor can revoke the trust or if the trust “provides that the trust can only be modified or terminated by a court” since the grantor (or his/her representative) can petition the court to terminate the trust.” SMM § 3259.1.5. I FIND that similarities between the modification or termination by a court and the clause that CFUA relied on to terminate one annuity and issue a new one show the annuity to be revocable.

The clause 3(b) contained in Petitioner’s annuity has been interpreted and used by CFUA to permit changes to seemingly irrevocable annuities, including the voiding of the existing annuity and reissuing a new annuity, made solely at the request of the purchaser. Whether or not Petitioner ever requests the annuity to be revoked and change the terms and condition of the original annuity does not change the fact that Mr. Pazo, in his authority as the President of the CFUA, testified that he has the power to do so.¹ Tr. At 65. He did not merely “modify the contract for someone else.” Exceptions at 2. He voided the original annuity contract and issued a new annuity contract that changed the length and the amount of the payment at the request of the purchaser. This was a wholesale revocation of the original “irrevocable” annuity contract.

Petitioner’s reliance on *Cushing v. Jacobs*, Civil Action 2:20-130 is misplaced. Any effect of that federal decision is prospective in nature. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). Here Petitioner’s application was denied six months prior to the decision and is not under its ambit.

¹Both Medicaid and Social Security have taken the position that remote or unlikely events in trust documents are considered possible regardless of the likelihood of occurrence for determining eligibility. See Program Operations Manual System (POMS) SI 01120.201D.2.c and SMM § 3259.6.E.


Moreover, the case here had the benefit of sworn testimony by Mr. Pazo, explaining his authority to revoke annuities. He was questioned extensively about the clause 3(b) in the contract that he relied on to change other annuities. Despite arguing that the funds were never returned in the prior matter, the fact remains that the annuity was revoked and a new one was issued. Having the ability to revoke one contract and have another takes its place, causes the annuity to be considered revocable. Additionally, the federal rules on annuities require that an annuity be actuarially sound. The ability to change and extend the length of the annuity in a new contract impacts the actuarial soundness of the annuity. The CFUA has determined that it has the authority under clause 3(b) as it appears in Petitioner's contract to make such changes at the request of the purchaser making the annuity revocable and changing the length of the payout which remove the annuity from the requirements of the federal law Tr. At 65. See 42 U.S.C.A. § 1396p(c)(1).

Thus, for the reasons set forth above and the findings and conclusions in the Initial Decision, I hereby ADOPT the Initial Decision and uphold the denial of Petitioner's application.

THEREFORE, it is on this ^{15th} day of JUNE 2020,

ORDERED:

That the Initial Decision is hereby ADOPTED.


Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance
and Health Services