

Looking Out for Both Spouses When One Enters a Nursing Home

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It is hard on both spouses when one has to go into a nursing home. For the spouse remaining at home, making sure his or her loved one is getting the best possible care is, of course, the top priority. But adjusting to this new living arrangement can be a stressful challenge, and figuring out how to pay for that care is another key issue. With nursing homes in northwest Pennsylvania costing over \$94,000 a year, it is no secret that long-term care is very expensive. When one spouse enters a nursing home, couples can see a large portion of their life savings quickly melt away.

When I work with married couples looking at a nursing home placement for one of them (the “institutional spouse”), a key focus is how to best protect the interests of the spouse remaining at home (the “community spouse”). Although the Medicaid laws have some important protections for the community spouse (he or she is permitted to keep a portion of the couple’s assets and is entitled to a minimum monthly income), this is often not enough to cover the long-term needs of the community spouse. Thus it is important to look for opportunities to increase the assets and income that the community spouse can keep, and a key part of my job as an elder law attorney is to be an advocate to help my clients get the maximum benefits allowed by the law.

Until about six years ago spousal annuities were frequently used in the Medicaid context. If they met certain requirements of the federal Medicaid law (for example, being immediate, irrevocable, non-assignable, and set up to pay out over a period of time not to exceed the life expectancy of the community spouse), such annuities were being routinely approved by the Pennsylvania Department of Public Welfare (DPW).

However, in the summer of 2005, Pennsylvania passed a law adding further restrictions to such annuities not found in federal law. This law created a presumption that any annuity income stream could be converted to cash, and it declared any non-assignment provision in an annuity contract void. (DPW decided on its own not to reject such annuities if the monthly annuity payments, when combined with all other income of the community spouse, was not greater than the minimum monthly income set by federal Medicaid law). With these rules in place, only small Medicaid annuities were permissible.

But over the next four years the legal status of Medicaid annuities in Pennsylvania changed as the result of two federal lawsuits against DPW challenging the validity of these restrictions, which existed only in Pennsylvania law or DPW’s own rules, not in the federal Medicaid law. In the first case, nursing-home resident Robert James purchased a \$250,000 annuity in September, 2005, for the benefit of his wife, Josephine; his application was denied and he filed suit against DPW in December, 2005. The second case was similar: nursing-home resident Theodore Weatherbee had purchased a \$400,000 annuity in November, 2006, for the benefit of his wife, Adeline; his application was also denied, and he filed suit against DPW in May, 2007. In both cases DPW argued that these annuities were available resources to Mr. James and Mr. Weatherbee and therefore they were not

eligible for Medicaid.¹ Both of these cases went to court – the *James* case in the Middle District of Pennsylvania and the *Weatherbee* case in the Western District – and in both the federal judge decided in favor of the Medicaid applicant. DPW appealed the judge's decision to the Third Circuit Court of Appeals in Philadelphia, and in both cases the Third Circuit upheld the lower court's decision. (*James v. Richman*, No. 06-5092, United States Court of Appeals for the Third Circuit, 547 F.3d 214 (November 12, 2008); *Weatherbee v. Richman*, No. 09-1399, United States Court of Appeals for the Third Circuit, 351 Fed. Appx. 786 (October 30, 2009).

In practice what this means is that in Pennsylvania when one spouse goes into a nursing home while the other spouse is at home, the couple's excess resources can be used to purchase a spousal annuity and, provided all of the requirements of the federal Medicaid law are strictly followed (for example, the annuity is immediate, irrevocable, non-assignable, set up to pay out over a period of time not to exceed the life expectancy of the community spouse, and names the DPW as the beneficiary in first place after the community spouse), the nursing-home spouse can then be eligible for Medicaid.² In other words, rather than having half or more of the couple's life savings spent-down on nursing care before the nursing-home spouse can be eligible for Medicaid, that money can be turned into an income stream for the benefit of the spouse still at home. In the right circumstances this can be a huge benefit for the couple.

The content herein is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified elder law attorney.

Note: *With the restrictions in the Deficit Reduction Act that came into effect in 2006, it is more true than ever that "time works against you" when planning for long-term care. It is important that families who have a spouse, parent or other loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advice as soon as possible. While ideally this should be done when there is at least five years before such care will be needed, families need to realize that even with the new restrictions in the DRA, there remain opportunities for seniors to protect a significant portion of their life savings when facing an immediate crisis, with no advance planning. But every day of delay represents a potential \$220 of irretrievable loss, so seek advice sooner rather than later.*

¹ The significant legal distinction between these cases is that late in 2005, Congress revised the federal Medicaid law, adding a requirement that all annuities name the state Medicaid agency (which in Pennsylvania is the DPW) as the beneficiary in the event there were any remaining annuity payments after the community spouse died. Because Mr. James had purchased his annuity prior to February 8, 2006, the effective date of the new federal law, these new rules did not apply to his case. But they did apply to Mr. Weatherbee, who had purchased his annuity after the new law went into effect.

² Because these were both decisions by the Third Circuit Court of Appeals, this is now the law not just in Pennsylvania but also in New Jersey, Delaware, and the Virgin Islands.

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