Looking Out for <u>Both</u> Spouses When One Enters a Nursing Home: Two Federal Court Cases Involving Spousal Annuities – Part 2

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Last month's article discussed the problems faced by couples when one spouse (the "institutional spouse") enters a nursing home, in particular the risk that a large portion of the couple's life savings would quickly melt away as it was used to pay the $6,000 or $7,000 monthly cost of nursing home care. Because the protections built into the federal Medicaid law are often not enough to cover the long-term needs of the spouse remaining at home (the "community spouse"), I pointed out that 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.

In such cases, while there are a number of different options to consider, one traditional strategy is to buy an annuity for the community spouse with some (or all) of that portion of the couple's assets that would otherwise be spent on the nursing home. Provided certain strict conditions set forth in the federal Medicaid law are met, doing this can accelerate the Medicaid eligibility for the institutional spouse while creating a guaranteed additional income stream for the community spouse to help insure there will be enough money in the future to take care of his or her needs.

I also mentioned that late in 2005, Congress revised the federal Medicaid law as part of the Deficit Reduction Act (DRA) and, among other things, added a requirement that all such 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.

Now DPW has taken the position that such annuities in a Medicaid context can only be used if the income generated for the community spouse, when combined with all of that spouse's other income, does not exceed the minimum income level set forth in the federal Medicaid law (currently $1,712 a month). If the annuity generates income in excess of this amount, DPW takes the position that the annuity is a countable resource because there are companies out there that will pay cash for such annuities (although at a steep discount).

As I mentioned in last month's article, the issue of whether this restriction on spousal annuities is contrary to the federal Medicaid law was litigated in federal District Court for the Middle District of Pennsylvania back in 2005 in the case of *James v. Richman*. When in late 2006 the district court decided in favor of Mrs. James and against the state, DPW appealed this decision to the Third Circuit. Two years later, in November, 2008, the Third Circuit issued its own opinion, agreeing with the District Court, finding against the DPW and in favor of Mrs. James. While this decision is now binding law in the Third Circuit (Pennsylvania, New Jersey, Delaware and the Virgin

Islands), it only applies to spousal annuities purchased prior to February 8, 2006, the effective date of the DRA.

So what about annuities purchased after that date? Did the DRA change the federal Medicaid rules to give the States free reign to prohibit such annuities? DPW says that it did. As it happens, this very issue was litigated in federal court right here in the Western District of Pennsylvania in Erie, in the case of *Weatherbee v. Richman*, No. 07-134 (W.D. Pa), with myself and Attorney René Reixach of Rochester, New York, representing Mrs. Weatherbee. As matters were left in last month's article, I did not disclose how this case was decided. Was DPW finally going to prevail in a Medicaid annuity case? Would the *James* decision become just a footnote in legal history?

Well, not to hold my readers in suspense, the decision by Judge Sean McLaughlin in *Weatherbee,* handed down on January 22, 2009, found against DPW and in favor of Mrs. Weatherbee. DPW's main argument had been that one sentence in the DRA showed that "Congress specifically amended the law to permit DPW to count the payment stream from an annuity as a resource in determining [Medicaid] eligibility." But the court disagreed. The one sentence DPW relied on simply stated: "Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity." 42 U.S.C. § 1396p(e)(4). By saying this, Judge McLaughlin did not think that Congress intended to give the States full discretion to invalidate spousal annuities that otherwise met the requirements set forth in the DRA.

For example, among other things, Congress added a requirement in the DRA that all annuities must 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. But if the States were free to deny an applicant Medicaid eligibility anyway, who did Congress envision would be using the new annuity requirements of the DRA? As Judge McLaughlin stated:

> [I]t would be incongruous for 42 U.S.C. § 1396p(e)(4) to have the meaning ascribed to it by the DPW. As set forth above, Congress delineated earlier in the subsection those additional requirements with which a Medicaid applicant must comply in order to *successfully* transfer assets, without penalty, to an irrevocable annuity. It is unreasonable to assume that Congress would have intended to take with one hand that which it had just given with the other. . . . [I]f Congress had intended to "ring the death knell" for otherwise compliant annuities, it would have said so. It did not.

So, is that the end of the matter? No! As in the *James* case, DPW has appealed this decision to the Third Circuit. So stay tuned. While it would be foolish for me to claim that I know how the Third Circuit will decide this case, I note that with *Mertz*, and *James*, and *James* again, and now *Weatherbee*, DPW is zero for four on spousal annuities in federal court. Perhaps in another year or two I will be doing a "Part 3" to this article to let my readers know what finally happened in the continuing saga of Mrs. Weatherbee versus the Pennsylvania Department of Public Welfare.

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 new restrictions in the Deficit Reduction Act, 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 planning opportunities for seniors facing an immediate crisis. Still, every day of delay represents a potential $220 of irretrievable loss.*

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