



By Bernard A. Krooks and Michael Gilfix

### Whew!

No horrible new federal legislation or state case law to report, but there are some national issues worth noting

**T**he good news in elder law is that there was no big news in 2007. That's a relief after years of new federal laws enacted to restrict people's access to needed public benefits and their ability to protect their remaining assets.

Of course, interesting elder law problems are still being considered around the country. But if a group of elder law experts were chatting today, they wouldn't necessarily agree on what the pressing issues are nationwide.

Here are some of the national issues that we think are worth noting:

**(1) Implementing the Deficit Reduction Act of 2005 (DRA)**—States continue to implement the ground-shifting DRA, enacted by Congress in February 2006.<sup>1</sup> About three quarters of the states have adopted enabling legislation, making the DRA active in their states. Others straggle, including California. But, hey, California still hasn't enacted enabling legislation for the Omnibus Budget Reconciliation Act of 1993 (OBRA '93). That means California's elder law is in a time warp, stuck back in the early 1990s. But for many clients this is a good thing, as both the 1993 and 2006 legislative changes restricted access to government benefits. Maybe there's something to California's passive resistance.

**(2) Counting annuities?**—A pending case out of Pennsylvania, *James v. Richman*<sup>2</sup> has national significance in that it could create a template for the feds to make access to government benefits, particularly Medicaid, more difficult to obtain for those with annuities. The DRA already made using annuities more difficult: The law gives rather detailed criteria that set pretty high hurdles for an annuity's value not to count when deciding a person's eligibility for Medicaid and other public

benefits. The *James* case would go even further.

In *James*, the annuity purchased provided that "this contract may not be surrendered, transferred, collaterally assigned, or returned for a return of the premium paid. This contract is irrevocable and has no cash surrender value. An owner may not amend this contract, or change any designation under this contract." Nevertheless, the government took the position that, because there is a secondary market for annuities, their value should be counted and potentially prevent Medicaid applicants from achieving eligibility. The government submitted an affidavit from the chief executive officer of J.G. Wentworth, a finance company specializing in the purchase of annuities, as evidence of the value and marketability of the annuity, despite non-assignment language in the contract in question.

The trial court was not impressed. It granted Robert James's request for a permanent injunction prohibiting the government from denying his Medicaid application as a result of the annuity being considered an excess resource. In so doing, it concluded that James was likely to succeed on the merits of his claims that he was being denied Medicaid assistance by the Pennsylvania government in violation of federal law and regulations.

The government appealed, and a decision from the U.S. Court of Appeals for the Third Circuit is expected after the first of the year. If it should go against James, the impact could be enormous, as the use of annuities has been, and continues to be after the DRA, a legitimate elder law planning technique.

**(3) Upholding caregiver agreements**—The DRA dramatically expands the period of ineligibility for people who give away their money and then seek government-financed health care. It both extends the look-back period from 36 months to 60 months and mandates that the period of ineligibility begins to run at a much later date, thereby increasing the time period that one must wait before receiving government benefits.

Yet some approaches still exist to effectively protect



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assets from the catastrophic costs of long-term care without running afoul of the DRA. One such approach is to enter into a caregiver agreement with a family member to whom money is transferred and who is to perform delineated services for the elder. The theory is that this contract is valid—so long as it's at arm's length—because the person who's doling out the money is receiving value for those funds in the form of services actually provided to him or her.<sup>3</sup>

On March 13, 2007, the Fifth Circuit upheld this kind of family values, personal services contract and did not impose penalties on a transfer of \$150,000 made in the Louisiana case of *Brewton*.<sup>4</sup>

So now it's rather clear: Clients can transfer potentially significant sums of money—perhaps \$100,000 or more—depending on the facts and responsibilities of the caregiver. But the other party does have to perform the caregiver services and pay income tax on the funds received as payment. These services have to be documented. And the contract has to be at arm's length.

"Arm's length" in this context means that the contract cannot give the family member acting as a caregiver any more than the going rate for a caregiver in her locality. If a local health care aid gets \$20 an hour, so too does the daughter-caretaker. If more sophisticated services are being provided, the rate of compensation can be correspondingly higher.

Not to whistle too loudly into the wind: the caregiver contract should prompt us all to think about how little the nation is paying people who provide care for the elderly. That stinginess is biting us in our tenderest extremities, every which way you look at it.

More immediately: Congress should make a little more nuanced this "arm's length" caveat in the caregiver contract. We had to tell a client who's a partner at a major law firm that he couldn't charge his mother's estate \$950 an hour, his normal fee for legal services, for taking her to the doctor, even though \$950 an hour is precisely what he lost in billings to help her. Yes, of course, he should do it because he loves his mother—and he did. But surely, the federal lawmakers can devise some compromise so that all people (not just high-priced lawyers who can afford to take the hit, but also members of the middle and working classes who cannot) are encouraged, rather than penalized, for helping family members in need. Over the long haul, having family members attend to each other improves everyone's health and well-being, benefiting society as a whole.

**(4) Getting a second bite at special needs trusts**—In the New York case of *Matter of Longhine*,<sup>5</sup> the testator,

Robert J. Longhine, died leaving three children. One of his children, James, had a disability. Longhine's will had set up a testamentary trust that provided for the distribution of principal and income to the boy. Unfortunately, this was not a special needs trust. At the time of Longhine's death, James was receiving means-tested government benefits. Receiving the testamentary trust, just as if James had received the money outright, would stop his benefits. This would not have happened if the same assets were left to James in a special needs trust.

James's guardian *ad litem* brought a construction proceeding to reform the testamentary trust into a special needs trust. The court gave the go-ahead: "The common sense presumption [here] is similar to the presumption that a testator will desire to reduce taxes to the greatest extent possible," which is of course permissible when reforming a will.

In the end, James was able to keep getting his government benefits and use the extra money his father had left him towards the extras that the government doesn't provide. This money could be used to pay for private nurses or other items not covered by Medicaid, such as a ticket to a sporting event.

**Two lessons from *Longhine*: First, plan properly. It's essential to set up special needs trusts where they might be needed. Second: If for any reason such planning didn't take place, cite *Longhine*. Most states have legislation allowing petitions to modify will or trust provisions in such circumstances.**

Here's hoping that 2008 is equally uneventful for elder law . . . unless there's a major change for the better because Congress and whoever gets into the White House find the political will to ensure that all of our nation's elderly and all of those with special needs are properly cared for—without thoroughly draining their families' coffers. TE

### Endnotes

1. See Michael Gilfix and Bernard A. Krooks, "Screwed," *Trusts & Estates*, January 2007, at pp. 45-48.
2. *James v. Richman*, No. 3:05-2647 (M.D. Pa. Nov. 21, 2006); available at [www.trustsandestates.com](http://www.trustsandestates.com) in the "Supporting Documents" section of the *Trusts & Estates* Bookstore and Library.
3. Rachel Emma Silverman, "Who Will Mind Mom? Check Her Contract," *The Wall Street Journal*, Sept. 7, 2006, at pp. D1-D2.
4. *Brewton v. State Dep't of Health and Hospitals*, No. 06-CA-804 (5th Cir. March 13, 2007); available at [www.trustsandestates.com](http://www.trustsandestates.com) in the "Supporting Documents" section of the *Trusts & Estates* Bookstore and Library.
5. *Matter of Longhine*, 2007 N.Y. Slip Op. 50517(U), Feb. 27, 2007; available at [www.trustsandestates.com](http://www.trustsandestates.com) in the "Supporting Documents" section of the *Trusts & Estates* Bookstore and Library.



