

**Date:** 14-Feb-06  
**From:** Steve Leimberg's Elder Care Law Planning Newsletter  
**Subject:** [DRA and Annuities](#)

LSI's Elder Care Newsletter Technical Editor, **Bernard A. Krooks**, founding member of **Littman Krooks LLP** ([www.elderlawnewyork.com](http://www.elderlawnewyork.com)) and **Harry S. Margolis**, founder and president of **ElderLaw Answers** (<http://www.elderlawanswers.com>) inform us that DRA-2005, signed into law on February 8th, makes annuities...

### **Still Good for the Spouse, But Not for the Issue**

#### **EXECUTIVE SUMMARY:**

A significant change in Medicaid rules limits the effectiveness of immediate annuities as a planning technique to pass along assets to children, but preserves it as a way to protect a nursing home resident's spouse. It does this by requiring that any annuities used to qualify for Medicaid coverage of nursing home care name the state as the first remainder beneficiary - up to the amount of Medicaid paid by the state on behalf of the nursing home resident.

#### **FACTS:**

##### **COUNTING ASSETS - NOT SHEEP OR INCOME**

Annuities have been used in the Medicaid planning context as a means of preserving the value of savings and investments by converting cash (a countable asset) to an annuity (a non-countable income stream). If done properly, the conversion of an asset to an income stream is not a penalized transfer for Medicaid purposes.

When a married nursing home resident applies for Medicaid coverage, both his assets AND his spouse's assets are counted.

The nursing home resident is limited to \$2,000 (in most states) in countable assets.

The community spouse is limited to half of the couple's total assets up to \$99,540. (Some states permit the community spouse to keep all of the couple's assets up to \$99,540.)

##### **HOME, FURNISHINGS, CAR, PREPAID FUNERAL PLANS NOT**

## **COUNTED:**

Virtually all assets are counted against these limits except for the family home, its furnishings, an automobile, and prepaid funeral plans. Some states exempt retirement assets - if they are in payout status.

On the other hand, there is no limit on the community spouse's income and she is not obligated to pay over any of her income towards the care of the nursing home spouse.

Therefore, a common planning technique was for the community spouse to take excess assets and use them to purchase an immediate annuity (that must meet certain parameters), thus transforming a countable asset (rendering the nursing home spouse ineligible for Medicaid coverage) into a non-countable income stream for the community spouse.

For instance, if a couple has \$200,000 in countable assets when the husband enters a nursing home, the wife could use \$100,000 to purchase an immediate annuity rendering her husband eligible for Medicaid coverage and preserving a lifetime income stream for her.

## **IMMEDIATE ANNUITIES:**

Immediate annuities generally come in three flavors:

- (1) life only (The annuity only pays for the community spouse's life),
- (2) term certain (The annuity pays for a guaranteed number of years). So if the community spouse does not live the entire term, the payments for the balance of the term after her death go to whomever she names as remainderman on the annuity.

(3) life with term certain (Pays for the longer of the guaranteed term or the community spouse's life).

One of the Medicaid requirements is that the annuity be "actuarially sound." That is, the guaranteed term may not be longer than the community spouse's actuarial life expectancy.

## **ANNUITY NOT CONSIDERED A TRANSFER IF...**

Sec. 6012(b) of the DRA provides that an annuity purchase will not be considered a transfer of assets if:

- (i) the State is named as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or
- (ii) the State 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 a representative of such child disposes of any such remainder for less than fair market value.

In other words, the spouse of a nursing home resident may still purchase an annuity to convert countable assets to non-countable income by purchasing an annuity.

However, the state must be named the first remainderman - up to the amount of Medicaid paid for the nursing home spouse.

The community spouse can still be protected for her life, but if she dies prematurely, the remainder may not be protected for her children.

### **ANNUITY STRATEGY FOR SINGLES:**

We alluded above to the use of annuities by unmarried nursing home residents.

Under this strategy, a nursing home resident would purchase an annuity with a term certain, in effect hoping that he would die early, so that the balance of the guaranteed stream of payments would pass to his children. Thus, this was a "bet to die" strategy. If the client died soon enough, then assets were passed to heirs. If the client lived too long, then the entire annuity was depleted on the cost of his care and nothing was left to be passed on to his heirs.

Prior to DRA, many clients preferred to simply transfer a portion of their assets to their children. However, with the new transfer of asset penalty rules, this strategy may not be as viable, meaning that the annuity strategy deserves another look. While under the new rules it means that the state has to be reimbursed before any balance of a guaranteed term goes to children. But at least there's the possibility of some funds passing on to future generations.

## **COMMENT:**

Annuities can still be used to protect spouses of nursing home residents. They may not preserve assets for the next generation as fully as was possible under pre-DRA law, but that has always been a less important purpose of this planning strategy.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Bernie Krooks Harry  
Margolis*

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## **CITES:**

Sec. 6012(b) of the DRA (Deficit Reduction Act of 2005) (S. 1932) (the "DRA")

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