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Elder Law Guys: Planning finances when spouse moves to nursing facility

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In our February column, we discussed some basics of nursing home finances for married couples. Our hypothetical couple, Marie and Ralph, were working to protect their resources and income for Ralph, who was going to become the "community spouse" with Marie's imminent admission to a skilled nursing facility as the "institutionalized spouse."

Now, let's look at the possible use of a "Medical Assistance qualified annuity," a planning tool that can be an important one for a married person whose spouse is already in a nursing facility or about to enter a facility and where the community spouse is relatively healthy and could possibly outlive their normal life expectancy.

Medical Assistance is a means-tested program that may require the spend down of excess resources in order for the institutionalized spouse to become eligible.

A Medical Assistance qualified annuity is an immediate annuity that is basically a contract between an individual and an insurance company by which the individual pays a sum of money and the insurance company sends the individual a fixed monthly check for the rest of that individual's life or for a period of time less than that individual's life.

Let's say Marie and Ralph had total countable resources of $350,000. With Ralph only being able to keep up to the community spouse resource allowance of $119,220 and with Marie's permissible amount of $2,400 (for Medicaid eligibility), they have excess resources of $228,380.

When one is in a nursing home, gifting of excess resources is generally not a good idea because of eligibility penalties that may be incurred. In Pennsylvania, Ralph's purchase of the annuity is not considered a gift or transfer of resources for the purpose of Marie's eligibility for Medical

Assistance. It is treated as an investment purchase using otherwise “countable” resources and converting them into a non-countable stream of income for Ralph.

Because the income of a community spouse isn’t counted for the institutionalized spouse’s eligibility, the use of such an annuity could allow Marie to become more quickly eligible for Medical Assistance.

For the purchase of the annuity to be considered as a permissible “spenddown” of excess resources and not as a transfer/gift within the five-year “lookback period,” there is a four-prong test emanating from the federal 2005 Deficit Reduction Act that must be met:

1. The annuity must be irrevocable and non-assignable. Ralph cannot have any right to take any of the annuity funds except by use of his monthly payments nor can he assign his rights to the annuity or the payments to anyone else.

2. Ralph must get back, at a minimum, what he paid into this annuity during his actuarial life expectancy, a term known as the annuity being “actuarially sound.” For example, let’s assume Ralph has an actuarial life expectancy of 15 years and he pays $228,380 for the annuity. He then must receive monthly annuity payments of at least $1,268.77 ($228,380 divided by 12 months a year x 15 years, or 180 months).

3. If the annuity is for a “term certain” (a guaranteed number of payments irrespective of the Ralph’s life expectancy), that term must be less than his life expectancy. In September 2015, the U.S. Third Circuit Court ruled that these type of annuities were not available resources and that the annuity could, in fact, be “short term.” Short term meaning that the annuity payment term could be significantly less than Ralph’s actuarial life expectancy.

4. The state (Pennsylvania) must be paid up to the amount of any Medical Assistance benefit which is paid on the institutionalized spouse’s behalf.

If Ralph were to die with payments remaining on his annuity, they are to be paid to the state as the “remainder beneficiary” of the annuity up to the amount the state paid for Medical Assistance services for Marie. Conversely, if Ralph outlives the annuity payments, then none of these monies are ever paid back to the state.

This discussion is limited to the use of Medical Assistance qualified annuities for a married couple. The use of such a tool is more limited as it relates to a single person in a nursing facility, as the income from the annuity would have to be paid to the facility. These are complex instruments that should be used only after adequate discussions with someone knowledgeable in their use.

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