

# **A Guide To Medicaid Annuities For Pennsylvania Lawyers**

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## Table of Contents

1. [Overview – Medicaid Planning with Annuities](#)
2. [Federal Law](#)
  - 2.1. [Basic Transfer Penalty Avoidance Rules](#)
  - 2.2. [Disclosure Requirements](#)
  - 2.3. [Effective Date](#)
  - 2.4. [CMS Guidance](#)
3. [State Guidance and Court Decisions](#)
  - 3.1. [DPW Operations Manual](#)
  - 3.2. [What is an Annuity Transaction](#)
  - 3.3. [Disclosure](#)
  - 3.4. [Non-Recognition of Non-Assignment Clauses –Rejected by the Courts](#)
  - 3.5. [State Transfer Guidance – DRA Compliant Annuities](#)
  - 3.6. [State Resource Guidance – Rejected by the Courts](#)
4. [Planning Options](#)
  - 4.1. [Planning for the Community Spouse](#)
    - 4.1.1. [Planning Within the DPW Guidelines](#)
    - 4.1.2. [Planning under James & Weatherbee](#)
  - 4.2. [Planning for the Unmarried Applicant](#)

## 1 OVERVIEW – MEDICAID PLANNING WITH ANNUITIES

As a result of the Deficit Reduction Act of 2005 (DRA)<sup>1</sup> annuities have become a vital planning tool for clients seeking to protect their resources from the costs of long-term care. The DRA authorizes the

<sup>1</sup> Pub. L. 109-171 (February 8, 2006). A copy of the annuity sections of the DRA, as amended by the Tax Relief and Health Care Act of 2006, are posted at [http:// www.paannuity.com](http://www.paannuity.com)).



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use of specialized annuities to gain immediate eligibility for Medicaid provided the annuity complies with the provisions of the law. In effect, people with too many resources to qualify for Medicaid can make those excess resources “disappear” through the purchase of the right annuity investment.

At the same time that the DRA gave favored treatment to annuities, the new law placed tough new restrictions on asset transfers and other planning options. As a result, knowledge of annuity-based planning is now a requirement for any lawyer advising either married or unmarried clients regarding asset protection.

There are many variations of annuity investments. The type of annuity that is useful in Medicaid asset protection planning is a form of “immediate annuity.” A commercial immediate annuity is purchased from an insurance company. The investor pays a sum of money to the insurance company. In return, the insurance company agrees to provide payments to the investor over a stated period of time. With an immediate annuity, the insurance company begins to make the contracted payments immediately.

Through the purchase of an annuity that conforms to the requirements of the DRA, (a “DRA compliant annuity”) individuals and couples who would otherwise have too many resources can qualify for Medicaid benefits. These annuities are an approved means by which an individual or couple can reduce excess resources without incurring any penalties.

The purchase of a DRA compliant immediate annuity can be a particularly valuable investment for the community spouse of an individual who needs long-term care. In determining eligibility for Medicaid/LTC, a married couple’s countable *resources* are pooled and excess resources are at risk. However, a community spouse can retain all of his or her *income* without affecting the Medicaid eligibility of the institutionalized spouse.

An immediate annuity converts a cash sum into a guaranteed stream of payments. Such payments are treated as income under Medicaid law.<sup>2</sup> As a result, the purchase of an immediate annuity can convert an otherwise countable excess resource (such as cash) into income for a Medicaid applicant or a non-countable stream of payments for the community spouse.

For married couples, the income from a DRA-compliant enhances the long-term financial security of the community spouse. The purchase of the annuity spends down a couple’s excess resources to the level required for the institutionalized spouse to become financially eligible for Medicaid/LTC benefits. The cash that is converted to income is recouped with interest over time as annuity payments are made to the community spouse.

This material is intended to help the Pennsylvania attorney counsel his or her clients regarding the effective use of DRA annuities to preserve financial security. It has been prepared by PCM, Pennsylvania’s leading supplier of Medicaid compliant annuities. PCM has over ten years of experience in helping Pennsylvania attorneys meet the unique requirements of Pennsylvania Medicaid law. It is the Pennsylvania lawyer’s trusted source for Medicaid annuities. Matthew Parker, President of PCM, was lead counsel in *James v. Richman*, the precedent-setting case on spousal annuities which is discussed below.

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<sup>2</sup> See discussion of the *James* and *Weatherbee* cases below.



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In order to expedite eligibility for the Medicaid applicant, the purchase of the annuity must avoid treatment as a penalized transfer of assets. This means that the applicant or community spouse must receive something of equal value in exchange for the purchase, and the annuity must meet the special requirements of the DRA. In addition, the annuity must be structured so that it will be treated solely as a source of income rather than as a resource. We have outlined these requirements in Section II below. This is followed by a discussion of Pennsylvania specific requirements in Section III. Finally, some planning examples are available in Section IV.

## 2 FEDERAL LAW

2.1. Transfer Rules. Congress and federal regulators have historically given preferential treatment to annuities. In OBRA 93, Congress delegated the Medicaid treatment of annuities to the Secretary of HHS.<sup>3</sup> Transmittal 64 to the *State Medicaid Manual* contained the Secretary's determination as to when an annuity is to be treated as a transfer of assets.<sup>4</sup>

Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with respect to the ultimate purpose of the annuity (i.e. whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate for the life expectancy of the beneficiary, the annuity can be deemed actuarially sound.<sup>5</sup>

Transmittal 64 established that an actuarially sound immediate annuity could be purchased without a transfer penalty. The DRA continues this rule subject to several modifications. To avoid treatment as a transfer, the purchase of an annuity must comply with both (1) the basic qualification rules and the (2) remainder interest rules.

1. Basic Transfer Penalty Avoidance Qualification Rules.<sup>6</sup> To avoid treatment as a transfer of assets, a post-DRA annuity transaction must either:

- A. Be funded with IRA or qualified retirement plan assets (a “qualified retirement annuity”); or
- B. Meet the following three requirements:
  - i. The annuity is irrevocable and nonassignable;
  - ii. The annuity is actuarially sound;

<sup>3</sup> 42 U.S.C. § 1396p(d)(6).

<sup>4</sup> See CMS, *State Medicaid Manual*, pt. III, Eligibility, § 3258.9B.

<sup>5</sup> *Id.*

<sup>6</sup> 42 U.S.C. § 1396p(c)(1)(G).



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- iii. The annuity provides for payments in equal amounts, with no deferral and no balloon payments made.

2. Remainder Interest Rules.<sup>7</sup> The DRA requires that the state be named as remainder beneficiary (**subordinate to the preferred interest of the community spouse and minor and disabled children**) to the extent of benefits paid. If the state is not named as a remainder beneficiary in the correct position, the purchase of the annuity by the applicant (or spouse) must be treated as a transfer of assets for less than fair market value.<sup>8</sup>

**Practice Tip.** Note that the DRA appears to give special treatment to annuities purchased with the proceeds of certain retirement plan accounts. Asset transfer provisions do not appear to apply to the purchase of “qualified annuities” held in IRAs and qualified retirement plans. This should mean that qualified annuities do not need to be actuarially sound to avoid transfer penalty. However, retirement plan qualified annuities are still subject to the DRA’s disclosure and remainder beneficiary provisions.

2.2. **Disclosure Requirements.** The DRA requires that applicants for Medicaid-funded long-term care must disclose any interests the applicant or spouse has in any annuities.<sup>9</sup>

2.3. **Effective Date.** The new annuity rules apply to any annuity purchased after February 7, 2006, or involved in a transaction after that date.

2.4. **CMS Guidance.** In July 2006, the Centers for Medicare & Medicaid Services (CMS) issued a letter to state Medicaid directors that provided some guidance regarding CMS interpretation of the transfer and annuity provisions of the DRA.<sup>10</sup> The [CMS guidance letter](#) reviews and comments on the annuity provisions of the DRA. It specifies how “actuarial soundness” is determined. (Non-retirement annuities must be actuarially sound to avoid transfer penalty.)

Under the *State Medicaid Manual*,<sup>11</sup> if the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound. The CMS letter directs states to “use the methodology for determining actuarial soundness that is found in the State Medicaid Manual Chapter III, Section 3258.9 B. However, do not use the actuarial life expectancy tables published in that section. Instead, use the current actuarial tables published by the Office of the Chief Actuary of the Social Security Administration. These tables may be accessed at <http://www.ssa.gov/OACT/STATS/table4c6.html>.”<sup>12</sup>

<sup>7</sup> 42 U.S.C. § 1396p(c)(1)(F).

<sup>8</sup> Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations, Changes in the Medicaid Annuity Rules under the Deficit Reduction Act of 2005, July 27, 2006, pt. II, p. 6.

<sup>9</sup> 42 U.S.C. § 1396p(e)(1). Disclosure is required regardless of whether the annuity involves a penalized transfer, is irrevocable, or is treated as an asset. The state must notify the issuer of the annuity of the state’s preferred status. The state may require issuers to notify the state of any change in the amount of income or principal being withdrawn.

<sup>10</sup> Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations, Changes in the Medicaid Annuity Rules under the Deficit Reduction Act of 2005, July 27, 2006.

<sup>11</sup> State Medicaid Manual, ch. III, § 325 8.9(B).

<sup>12</sup> Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations, New Medicaid Transfer of Asset Rules under the Deficit Reduction Act of 2005, July 27, 2006.



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Despite the CMS guidance, many issues in regard to the treatment of annuities under the DRA remained open. The DRA's improvident use of the term "annuitant" raised so many questions that this aspect of the new law had to be corrected by the Tax Relief and Health Care Act of 2006.<sup>13</sup> Now that some years have passed, state guidance and case law have helped clear up many of these questions. Furthermore, case law has helped correct some errors in Pennsylvania's state guidance.

### 3 STATE GUIDANCE AND COURT DECISIONS

3.1 DPW Operations Memorandum. On March 3, 2007, DPW issued a statement of Policy and related operations memoranda to implement the DRA in Pennsylvania.<sup>14</sup> Included was an operations memorandum on the subject of annuities.<sup>15</sup> The DPW annuity memorandum was intended to provide interim guidance from DPW to County Assistance Offices regarding the handling of annuities owned by Medicaid applicants and their community spouses. Some of the policy positions taken by DPW in the interim operations memorandum remain valid while others have been discredited by subsequent court decisions.

A denial of Medicaid/LTC benefits may result if an annuity is treated as either a transfer or as an available resource. Thus, for planning purposes *the ideal annuity is one that will not be an available asset and whose purchase will not involve a penalized transfer of assets*. The operations memorandum sets out the state's initial directions for the path to be followed to meet these goals with no objection from the state.

The operations memorandum policies apply to applicants, recipients, and spouses of applicants and recipients who purchase a nonqualified annuity, or make a transaction involving a nonqualified annuity, on or after February 8, 2006.

3.2. What Is an Annuity Transaction? An annuity "transaction" is any action taken by the individual affecting the payment from the annuity or a change affecting the payment of the income or principal of the annuity.<sup>16</sup> Examples of transactions are purchases, additions to principal, elective withdrawals, requests to change distribution of the annuity, elections to annuitize the contract, and similar actions.

3.3. Disclosure. Mirroring the DRA, the Operations Memorandum requires an applicant or recipient and spouse disclose any interest that he/she has in an annuity.<sup>17</sup>

3.4. Non-Recognition of Non-Assignment Clauses – Rejected by the Courts. In a section later held invalid in a Federal Court case,<sup>18</sup> the operations memorandum attempts to prohibit anti-assignment

<sup>13</sup> Tax Relief and Health Care Act of 2006, div. B, Title IV, § 405.

<sup>14</sup> Statement of Policy: Provisions of the Deficit Reduction Act of 2005 on Medicaid Eligibility for Long-Term Care Services, 37 Pa.B. 1043, March 3, 2007, <http://www.pabulletin.com/secure/data/vol37/37-9/353.html>.

<sup>15</sup> DPW Operations Memorandum, Medical Assistance: Annuities is also available online at is online at [http://www.paannuity.com/draft\\_ops\\_memo.html](http://www.paannuity.com/draft_ops_memo.html).

<sup>16</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p 2.

<sup>17</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p 5.

<sup>18</sup> *Weatherbee v. Richman*, 595 F. Supp. 2d 607 (W.D.Pa.2009), aff'd 2009 U.S. App. LEXIS 24939, 2009 WL 3792406 (3d Cir. 2009).



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clauses in annuities.<sup>19</sup> The discredited provision, which is based on a similar provision in 62 P.S. Section 441.6), states:

Any provision in an annuity or similar contract for the payment of money owed by an applicant, recipient or spouse of an applicant or recipient, limiting the right to sell, transfer or assign the right to receive payments or restricting the right to change the beneficiary will not be recognized by DPW. It will be presumed that any annuity or similar contract to receive money is marketable.<sup>23</sup>

In [Weatherbee v. Richman](#),<sup>20</sup> the Federal Court for the Western District of Pennsylvania held that §441.6(b) was in conflict with and preempted by the Federal Medicaid Act. The Court enjoined DPW from using the section to deny Medicaid benefits to an individual whose community spouse owned a DRA compliant annuity.<sup>21</sup> The District Court holding was later affirmed by the 3<sup>rd</sup> Circuit Court of Appeals.<sup>22</sup>

3.5. State Transfer Guidance—DRA-Compliant Annuities The Operations Memorandum mirrors the DRA by specifying that an annuity transaction is a *transfer* of assets for less than fair market value unless the annuity meets all of the following DRA requirements:<sup>23</sup>

- the annuity is irrevocable and nonassignable;
- the annuity is actuarially sound;
- the annuity provides for payments in equal amounts, with no deferral and no balloon payments made; and
- the annuity names DPW as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the applicant/recipient (or second position if the applicant has a community spouse, a minor child, or a disabled child).

Annuities that meet the above requirements are sometimes referred to as “DRA-compliant annuities.” An annuity that meets these four tests is deemed to have been purchased for fair market value and no transfer penalty will be applied.

3.6. State Resource Guidance – Rejected by the Courts. To be effective, an annuity must convert excess available resources into income. If the payment stream from an annuity is

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<sup>19</sup> The provision in the Operations Memorandum reflected a similar section of Act 42 of 2005. Act 42 added Section 441.6(b) of the Welfare Code (62 P.S. Section 441.6). This section was enacted at the request of DPW as an attempt to bolster its argument that a community spouse can assign the income stream of a Medicaid annuity. The section voided anti-assignment provisions in annuities.

<sup>20</sup> *Weatherbee v. Richman*, 595 F. Supp. 2d 607 (W.D.Pa.2009), aff'd 2009 U.S. App. LEXIS 24939, 2009 WL 3792406 (3d Cir. 2009).

<sup>21</sup> Under the Medicaid Act and the U.S. Constitution, if there is a conflict between federal and state Medicaid law, such that it is impossible to comply with both, the state law is likely preempted. Supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2.; Medicaid Act, 42 U.S.C. § 1396 et seq.

<sup>22</sup> *Weatherbee v. Richman*, 2009 U.S. App. LEXIS 24939, 2009 WL 3792406 (3d Cir. 2009).

<sup>23</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p. 3.



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treated as a resource rather than income, the annuity won't accelerate Medicaid eligibility. The applicant will still be over-resourced. The Operations Memorandum establishes that in most cases, DPW will treat the income from a DRA-compliant annuity as income not as a resource. However, in a policy provision that was later invalidated in a series of court decisions, the Operations Memorandum takes the position that a DRA-compliant immediate annuity that produces more than a modest income stream for a community spouse will be treated as a countable resource. The [Operations Memorandum](#) sets out the following guidelines:

1. Annuity Owned by the Applicant/Recipient of MA/LTC:

- A. A *qualified retirement plan annuity* owned by the applicant/recipient that names DPW as the beneficiary in the first position will be counted as **income** (and not as a resource) to the applicant/recipient.<sup>24</sup>
- B. The purchase of a DRA-compliant nonqualified annuity by an applicant/recipient will be treated as **income** rather than as a resource.<sup>25</sup>

2. Annuity Owned by the Community Spouse:<sup>26</sup>

- A. A *qualified retirement plan annuity* of the community spouse is exempt as a resource.<sup>27</sup>
- B. A nonqualified annuity owned by the community spouse will be treated as **either income or a resource** depending upon the aggregate income of the community spouse.<sup>28</sup> If the annuity provides the community spouse with monthly income that, when combined with all the other available income to the community spouse, is **no greater than** the CSMMNA,<sup>29</sup> the annuity is to be treated as *income* to the community spouse. If the annuity provides the community spouse with monthly income that, when combined with all the other available income to the community spouse, **exceeds** the CSMMNA, the annuity is to be treated as an *available resource*.<sup>30</sup>

DPW's attempt to treat an annuity that provides the community spouse with income in excess of the CSMMNA guideline has been rejected by both state and federal courts in several cases, [James v. Richman](#), 547 F.3d 214 (3 Cir. 2008), [Weatherbee v. Richman](#), 595 F. Supp. 2d 607 (W.D.Pa.2009), aff'd 2009 U.S. App. LEXIS 24939, 2009 WL 3792406 (3d Cir. 2009. and [Ross v. DPW](#), 936 A.2d 552, 555

<sup>24</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.7.

<sup>25</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.7-8 (Example 1).

<sup>26</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.4.

<sup>27</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.5.

<sup>28</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.10-13 (Examples 4-5).

<sup>29</sup> The Community Spouse Monthly Maintenance Needs Allowance (CSMMNA) is defined in section 1924(d) of the Social Security Act (42 U.S.C. § 1396r-5(d)), which mandates the treatment of income and resources in regard to certain institutionalized spouses. It is most typically the Minimum Monthly Maintenance Needs Allowance plus any excess shelter allowance. See also 55 Pa.Code § 181.452(d)(2), and DPW Statements of Policy, March 3, 2007, <http://www.pabulletin.com/secure/data/vol37/37-9/353.html>.

<sup>30</sup> DPW Operations Memorandum, Medical Assistance: Annuities, p.10-13 (Examples 4-5)



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(Pa. Commw. Ct. 2007). These cases establish that, contrary to the Operations Memorandum, DPW cannot treat the income stream produced by a non-revocable, non-transferrable annuity as a resource.

Such a rule would completely undermine federal law, which excludes income of the community spouse from factoring into the institutionalized spouse's Medicaid eligibility. Indeed, a holding that the market value of an income stream derived from an irrevocable actuarially sound annuity is a countable resource would effectively contravene the MCCA [the Medicare Catastrophic Coverage Act], which provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. §1396r-5(b)(1). [James v. Richman](#), 465 F.Supp.2d 395 (M.D. Pa. 2006), at 406.

In affirming the district court's decision in *James* the 3<sup>rd</sup> Circuit Court of Appeals noted:

[t]he Department's position would treat the hypothetical proceeds from the creation of a new annuity as a currently available resource. There is no statutory basis for such a theory and, indeed, adopting it would tend to undermine the MCCA rule that "no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(b)(1).

[James v. Richman](#), 547 F.3d 214 (3 Cir. 2008), at 218-219.

## 4 PLANNING OPTIONS

DRA annuities can be useful investments for both married and unmarried applicants for Medicaid. This section will offer some suggestions for planning in both the married and unmarried contexts.

### 4.1 Planning for the Community Spouse

Under both federal and state rules, the purchase of an immediate annuity that meets the DRA's basic transfer and remainder interest rules is not a transfer. The purchase of a DRA annuity by a community spouse does NOT trigger a transfer penalty.

Under its Operations Memorandum on annuities issued in March 2007, DPW stated a policy that it would treat community spouse annuities that produced income in excess of the CSMMNA as a resource. This policy was effectively rejected by the federal courts in the *James v. Richman* and *Weatherbee v. Richman* cases. *James* and *Weatherbee* allow a community spouse to invest even substantial excess resources in a DRA compliant annuity to immediately reduce resources to the Medicaid eligibility level.<sup>31</sup>

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<sup>31</sup> Until the Department formally drops the "annuity income can be a resource" policy expressed in Operations Memorandum, a community spouse may receive an initial denial notice where annuities are purchased that provide income above the guideline. While controlling federal law does not permit the state to limit the value of a DRA compliant annuity, a submission from the local CAO to DPW Office of Legal Counsel or a fair hearing or other appeal may be required to force the state to comply.



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Under the case law, a community spouse should often be able to convert all excess resources to protected income. To do so, the community spouse purchases a DRA annuity in an amount sufficient to reduce all excess resources to eligibility levels. The discredited income restrictions in the Operations Memorandum guidelines are simply ignored.

The facts in *Weatherbee* illustrate how to use this planning option to protect substantial excess resources.

On September 1, 2006, Theodore Weatherbee was admitted to a nursing facility in Warren, Pennsylvania. Mr. Weatherbee and his wife, Adeline, had countable resources worth \$543,635. After allowing for the community spouse resource allowance, the couple had \$442,695 in available resources. If the couple had retained these resources, Mr. Weatherbee would never qualify for any Medicaid assistance. Instead, with the advice of her elder law attorney Mrs. Weatherbee took the following actions:

1. She had already spent over \$20,000 by privately paying for Mr. Weatherbee's care before she consulted the elder law attorney.
2. She spent \$10,000 on two pre-paid funerals.
3. She spent \$21,252 on a new vehicle.
4. With the remaining excess resources she purchased a DRA-compliant annuity that provided her with payments of \$4,423.47 per month over 107 months. Over the life of this annuity she will receive \$473,261 in payments.
5. In February 2007, Mr. Weatherbee applied for Medicaid long term care benefits.
6. The *Weatherbee* court held that the annuity must be disregarded in determining Mr. Weatherbee's eligibility for Medicaid.

Thus, as a result of the purchase of the annuity Mr. Weatherbee qualified for Medicaid assistance as soon as his application was filed.

#### 4.2. Planning for the Unmarried Applicant.

DRA annuities are also a useful planning tool for unmarried but over-resourced potential applicants for Medicaid. An unmarried applicant can gain immediate eligibility for Medicaid through the purchase of a DRA annuity. There is little downside risk to the annuity purchase. DPW does not object to an unmarried person's purchase of a DRA annuity. Where better planning options are not available, the annuity may be the planning of "last resort."

The purchase of a DRA annuity by an unmarried Medicaid applicant can provide a number of benefits. These include:

- (1) accelerating Medicaid eligibility which results in a reduction of the monthly cost of care<sup>32</sup> to the Medicaid rate.
- (2) reducing resources in order to begin the running of the penalty period where transfers have been made.
- (3) providing a source of payment for care during a transfer penalty period.

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<sup>32</sup> because of the disparity between Medicaid and private payment rates.



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(4) qualifying the purchaser for regular Medicaid (even during a transfer penalty period), which can substantially lower other health-care costs (e.g., prescription drugs).

(4) providing the Medicaid recipient with a long term income stream which may some day facilitate the purchaser's eventual discharge from a nursing facility and provide a source of funding for private pay home or assisted living care. The use of an annuity is particularly advantageous if the purchaser does not remain on Medicaid permanently.

(5) increasing the likelihood that some funds may be left over for children after state reimbursement claims are paid.

Of course, the transfer and remainder interest provisions of the DRA must be met. In addition to naming the state as remainder beneficiary to the extent of benefits paid, a non-retirement annuity must meet the DRA-compliant annuity requirements. This means that the annuity must:

- be irrevocable and nonassignable;
- be actuarially sound;
- provide for payments in equal amounts, with no deferral and no balloon payments made; and
- name DPW as the beneficiary in the first position for at least the total amount of Medical Assistance paid on behalf of the applicant/recipient<sup>33</sup>

**Planning Tip:** Special rules apply to “qualified retirement annuities.” The disclosure and state remainder requirements apply to all annuities transacted upon after the date of enactment of the DRA. However, the basic transfer penalty avoidance rule provisions (irrevocability, non-assignability, actuarial soundness, equal payments, no deferral or balloon payments) do not appear to apply to qualified retirement annuities.<sup>34</sup> This means that DRA-qualified retirement annuities should not have to be

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<sup>33</sup> 42 U.S.C. § 1396p(c)(1)(G)(ii).

<sup>34</sup> 42 U.S.C. § 1396p(c)(1)(G)(i). In one section of its operations memorandum, DPW implies that a qualified annuity owned by an unmarried MA/LTC applicant must also be DRA-compliant to avoid transfer treatment. If the annuity owned by the applicant/recipient or the non-qualified annuity of the CS does not meet all the requirements listed above, the annuity or the transaction involving the annuity shall be treated as a transfer of assets for less than FMV. If the applicant/recipient is otherwise eligible for Medicaid, a period of ineligibility for payment of LTC services shall be imposed. (DPW Operations Memorandum, Medical Assistance: Annuities, p. 6.) Any DPW requirement that qualified annuities be both qualified and DRA-compliant (i.e., irrevocable, non-assignable, actuarially sound, no deferral or balloon) to avoid treatment as a transfer would appear to be in conflict with the DRA. Under the DRA, a qualified annuity is not an asset for purposes of the transfer of asset rules. An annuity can avoid the transfer rules either by (1) being qualified, or (2) being DRA-compliant. Thus, DPW's attempted imposition of the DRA's actuarial soundness compliance requirements on a qualified annuity would likely be unenforceable if contested.



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actuarially sound or irrevocable and non-assignable.<sup>35</sup> This can allow for additional “stretch out” of annuity payments and lower co-payments towards the cost of care.

The purchase of a DRA-compliant annuity by an unmarried Medicaid applicant should not be disregarded just because it does not offer the truly dramatic savings that are available to a community spouse. Significant savings are still possible for the unmarried Medicaid applicant and the purchase of a DRA annuity is often the best planning option available.

Here is an illustration of how this annuity planning strategy can work.

#### Illustration: DRA Annuities for Unmarried Persons

Assume that the private payment rate at John’s nursing facility is \$6,800 per month and the Medicaid payment rate to the facility is \$5,400 per month. Once John qualifies for Medicaid/ LTC, the facility will only be able to charge him the \$5,400 Medicaid monthly rate, thereby reducing John’s monthly cost of care by \$1,400. This will slow the dissipation of his assets by \$1,400 every month. Consider the following somewhat oversimplified illustrations:

Example 1: Here is John’s situation if he **does NOT purchase an annuity**. Assume John dies in 18 months without purchasing the annuity:

<b>John’s available resources</b>	<b>John’s monthly income</b>
- \$1,565 in a checking account	\$1,941 Social Security and pension
- \$86,500 in savings	
- \$88,065 Total resources	
- \$6,800 Monthly NH cost	
- \$1,941 Monthly amount paid from John’s income	
- \$4,859 Monthly amount paid from John’s resources	

**Result:** After 18 months John will have dissipated \$87,462 of his resources ( $\$4,859 \times 18 = \$87,462$ ). At his death nothing is owed to DPW since John never qualified for Medicaid/LTC. John has \$603 remaining at death ( $\$88,065 - \$87,462 = \$603$ ) to pass to his daughter Joan.

Example 2: Here is John’s situation **if he purchases an annuity**—again assume John dies in 18 months but after purchasing the DRA-compliant annuity:

<b>John’s available resources</b>	<b>John’s monthly income</b>
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<sup>35</sup> For further discussion and examples, see Marshall, *Elder Law in Pennsylvania*, Second Edition, Pennsylvania Bar Institute (2007), pp. 446-449.



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- \$1,565 in a checking account                      \$1,941 Social Security and pension
- \$1,471 DRA-compliant annuity
- \$1,565 Total resources
- \$5,400 Monthly NH cost (Medicaid rate)
- \$3,412 Monthly amount paid from John's income (\$1,941 + \$1,471) - \$0 Monthly amount paid from John's resources
- \$1,988 Monthly amount paid by Medicaid (\$5,400 – \$3,412)

**Result:** At his death after 18 months, John will have 3 1/2 years (42 months) or \$61,782 of annuity payments remaining ( $42 \times \$1,471 = \$61,782$ ). From those payments, Medicaid (DPW) will be owed \$35,784 ( $\$1,988 \times 18 = \$35,784$ ). After Medicaid is paid, there will be \$25,998 in annuity payments plus \$1,565 in other resources to pass to Joan. Joan will receive \$27,563.

The use of the annuity will have preserved an extra \$26,960 for Joan ( $\$27,563 - \$603$ ).

DRA annuities are frequently the best means of protecting the financial security of a family facing the devastating cost of long term care. PCM has a long history of helping Pennsylvania attorneys serve the best interests of their client. Contact PCM for an annuity that is tailored specifically for the clients of Pennsylvania lawyers.

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