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ANNUITIES

Annuities are often used as a component of elder law planning. Annuities may be either qualified or non-qualified. Qualified annuities are those which use assets from pre-taxed investments or entities such as IRA's, qualified plans, Roth IRA's, 401(k) plans and 403(b) plans. Non-qualified annuities are purchased with after tax dollars and may be purchased purely for investment purposes. Annuities are governed under § 6012 of the Internal Revenue Code. The Deficit Reduction Act of 2005 ("DRA"), which was implemented effective February 8, 2006, impacted the use of annuities.

Certain transactions which occur on or after February 8, 2006 make an annuity, including one that was purchased prior to that date, subject to the provisions of the DRA. This includes (a) actions which change the course of payments to be made under the annuity; or (b) the treatment of the income or principal of the annuity. This includes any of the following:

- additions of principal
- requests to change the distribution of the annuity
- an election to annuitize the annuity contract
- taking elective withdrawals
- any other similar actions which are taken by the owner of the annuity on or after February 8, 2006
- routine changes which do not require an election or action are not subject to the DRA

Individuals who have invested in annuities but have not annuitized the annuity before February 8, 2006 will be subject to the rules of the DRA.

The purchase of an annuity is treated as the disposal of an asset for less than fair market value unless (1) the state is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant or (2) the state is named as 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. Specific requirements are set forth in the United States Code pursuant to **42 U.S.C. §1396p(c)(1)(F) and 42 U.S.C. §1396p(c)(1)(G)**

(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless –

- (i) the State is named as the remainder 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.

(G) For purposes of this paragraph with respect to a transfer of assets, the term “assets” includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long term care services under this title unless –

(i) the annuity is –

(I) an annuity described in subsection (b) or (q) of the Section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from –

(aa) an account or trust described in subsection (a), (c), or (p) of Section 408 of such Code;

(bb) a simplified employee pension (within the meaning of Section 408(k) of such Code); or

(cc) a Roth IRA described in Section 408A of such Code; or

(ii) the annuity –

(I) is irrevocable and non-assignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

It is important to review this language of the DRA in determining the use of the annuity. The statute clearly provides for three (3) ways where the purchase of an annuity will not be considered a disposal of an asset for less than the fair market value.

- if the state is named as the remainder beneficiary in the first position (or second after the spouse or minor or disabled child)
- an annuity purchased by or on behalf of an annuitant who has applied for medical assistance but is one of the annuities described in (G)(i)
- pursuant to subsection (G)(ii), if the annuity is irrevocable and non-assignable, actuarially sound, and provides for payments in equal amounts during the term of the annuity. [The annuity must meet the actuarial standards published by the Office of the Chief Actuary of the Social Security Administration. Those tables can be found at <http://www.ssa.gov/OACT/STATS/table4c6.html>]

In all of the above instances, the purchase or ownership of the annuity is not considered the disposal of an asset for less than fair market value. As such, an applicant will not be denied benefits for medical assistance for long term care services solely as a result of such purchase or actions, as discussed above, pertaining to such annuity.

The Commonwealth of Massachusetts has adopted comparable provisions under *130 CMR 520.007(J)(1)* and *130 CMR 520.007(J)(2)*:

If an annuity can be converted to a lump sum, the lump sum, less any penalties or cost of converting to a lump sum is a countable asset. In addition the purchase of an annuity for nursing facility residents is a disqualifying transfer of assets in the following situations:

- when the beneficiary is other than the applicant, member or spouse;
- when the beneficiary is the applicant, member or spouse and when the total present value of projected payments for the annuity is less than the value of the transferred asset (purchase price)
- when the terms of the annuity postpone payment beyond 60 days, Mass Health will treat the annuity as a disqualifying transfer of assets until the payment start date; or
- when the terms of the annuity provide for unequal payments *CMR 520.007 (J)(1)(d)*.

The provisions of *130 CMR 520.007(J)(2)* provide that the purchase of an annuity will be considered a disqualifying transfer of assets under the following conditions:

- Someone other than the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant;
- Someone other than the Commonwealth of Massachusetts is named beneficiary in the second position after the community spouse or minor or disabled children;

- Someone other than the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor disabled children in 130 CMR 520.007 (J)(2)(a)(ii) disposes of any such remainder for less than fair market value.

The Commonwealth of Massachusetts further provides that the purchase of an annuity will not be considered a disqualifying transfer of assets if the annuity names the Commonwealth of Massachusetts as a beneficiary when the annuity is described in subsection b or q of section 408 of the IRC, purchased with the proceeds from an account or trust described in subsection a, c, or p of section 408 of the IRC; or purchased with the proceeds from a SEP under section k of section 408; or purchased with the proceeds from a Roth IRA. [Consider – Is the required payment net of income taxes or dollar for dollar in those instances?]

The DRA provides that all states must include in their application for medical assistance for long term care services all information and questions regarding the individual's ownership of an annuity. If the individual fails to report the annuity, then coverage will be denied or if already in effect, coverage will be terminated.

It is important to note that the DRA governs the treatment of annuities only with respect to transfer of assets. If the annuity is not deemed to be a transfer of the asset then the DRA will not govern it. But, all non-retirement annuities will be counted as assets for purposes of the transfer of asset rules unless they are irrevocable and non-assignable.

- annuities can allow for periodic payments made less frequently than monthly as long as they provide for payments in equal amounts. As such, monthly, quarterly or annual payments should satisfy this requirement.
- DRA provisions do not apply to annuities purchased by a third party on behalf of a Medicaid applicant/beneficiary or community spouse with funds that never belonged to the applicant/beneficiary or community spouse.
- **DRA provisions should not apply to annuities purchased by or on behalf of a community spouse.** (They do not apply in Massachusetts in this instance.)
- DRA provisions apply to annuities purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long term care services unless certain requirements are met. As such, the community spouse should be able to use his or her resource allowance to purchase an annuity without the purchase being treated as the disposal of an asset for less than fair market value.
- **Note that in all instances, where there is no community spouse or minor or disabled child, and the annuitant has applied for MassHealth benefits, the state should be named as the first beneficiary.**