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State Medicaid Ruling Faces Legal Challenge

Attorney, officials argue whether annuities should count toward assets

By Jay Stapleton

Elder law attorneys are well aware of the issue: The cost of long-term care for senior citizens is skyrocketing, but to qualify for Medicaid assistance to cover nursing home stays couples have to divest themselves of most of their assets.

However, a pair of lawsuits brought by Connecticut families could open the door for more seniors to receive Medicaid benefits for long-term care without having to give up annuities and the income they provide.

The first case stems from a complaint filed in U.S. District Court in Connecticut by John F. Lopes, 85, who has resided at Riverside Health Care Center in East Hartford since late 2008. In 2010, the Connecticut Department of Social Services denied Lopes's request for Medicaid benefits because his wife had a $166,000 annuity, well above the Medicaid asset threshold. (The Medicaid program is operated jointly by the federal government and the states.)

But attorney Paul Czepiga, of CzepigaDaly-Dillman in Newington, challenged the ruling and won. Although the state of Connecticut has appealed, Czepiga said the ruling could create a new estate planning tool for people seeking to protect their resources and still qualify for government long-term care benefits. "This is brand new," Czepiga said, adding that more cases could soon follow if the ruling stands. "We are watching to see what happens in this case."

In this case, the annuity belonged to Lopes' wife. In rejecting Lopes' Medicaid application, the state cited its own regulation that treats annuities as an available resource to cover long-term care for either spouse rather than an income source for one person, in this case Lopes' wife.

The case is now before the U.S. Court of Appeals for the Second Circuit. There, judges will consider a federal law which provides that assets are not joint resources if an individual does not have the "legal right, authority, or power to liquidate them." Attorneys for the Lopes' will argue that because the annuity is "irrevocable" — meaning that it can't be transferred to someone else — it shouldn't be considered as a resource to pay for John Lopes' care.

Different states have different views on how annuities factor in to Medicaid thresholds. Some agree with the seniors like the Lopes. But the state of Connecticut argues annuities that pay monthly income are a legitimate resource for paying long-term care bills. And so Amelia Lopes, 82, was forced to sell her annuity for a loss, in order for John Lopes to receive Medicaid funding, to pay for his nursing home care.

Assets vs. Income

Czepiga sued, arguing that Connecticut's policy was a violation of federal law. While half of marital assets must be spent before Medicaid benefits can be claimed, Czepiga claimed that the annuity wasn't an asset — because it couldn't be liquidated — but should be considered income. "Under federal Medicaid rules, when you have a spouse in the community [rather than in a nursing home], any income that spouse has is his or hers to do what they please," Czepiga said. "The income of a [community] spouse is not supposed to be at risk."

U.S. District Judge Janet C. Hall agreed with his argument, and directed the state to approve his Medicaid application and pay damages. She determined that Amelia Lopes could keep the couples' home and a maximum of $113,000 in assets, such as stocks and cash. The $166,000 annuity, which paid $2,340 a month, should not be considered in computing Medicaid eligibility, the judge found.

In its appeal, the state argues that if the ruling stands, public Medicaid money will go to senior citizens who have substantial resources rather than for the impoverished. "We are charged with safeguarding the public benefits for the use of those who are truly in need," Kathleen Kabara, a spokeswoman for the Department of Social Services, said in a statement last week.

In a letter to the appeals court, Hugh Barber, an assistant attorney general, said the Lopes's are simply trying to get around the rules. "The issue here is a well-to-do couple's effort at avoiding the resource eligibility rules by attempting to convert excess resources into what is allegedly only 'income' of the community spouse," Barber wrote.

Czepiga filed another case last summer for a different client with similar circumstances. However, that litigation has been delayed pending a decision on an appeal of the Lopes' case.

The cases could impact similar rulings nationally, although Czepiga said there are limitations to how many people could utilize the annuity strategy. For one thing, the law applies only to married couples. And the spouse not needing long-term care would have to have "more than a modest amount of money" to make the strategy viable. In other words, it would make sense only if the "community spouse" could buy an annuity large enough to generate payments that would cover costs of everyday living. Further, it would be advisable only for healthy seniors likely to live long enough to recoup the amount invested in the annuity.

"Of all the married couples entering retirement, I'd say only 20 percent might find this to be an option," Czepiga said.•

Paul Czepiga and Brendan Daly, the two attorneys arguing these cases, have a reputation for successfully guiding clients through the complexities of and changes in Medicaid eligibility and asset protection. Contact them when you need guidance in this area.