2009 HOUSE HUMAN SERVICES

HB 1299

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1299

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: January 20, 2009

Recorder Job Number: 7275 17 min. 48 sec.

Committee Clerk Signature Vicky Crabtree

Minutes:

Chairman Weisz: Hearing for HB 1299 is called to order.

Carlee McLeod, representing the ND Chapter of National Academy of Elder Law Attorneys: was in support of the bill. She read the testimony of Gregory C Larson an attorney in Bismarck. **See attached Testimony #1.** Ms. McLeod also read her testimony in support. **See attached Testimony #2.**

Chairman Weisz: Any questions from the committee? Concerning the agreement on the federal issue, could you go into more detail as to why (inaudible)?

Carlee McLeod: the issue is the federal law (inaudible) department (inaudible) assets transferred is prohibited by federal law.

Representative Conrad: (Inaudible).

Carlee McLeod: One of 2 or 3 states who do not allow it. (Inaudible). I can follow up on that.

Chairman Weisz: Further questions? If not, thank you very much. Any support for 1299? Anyone here in opposition of HB 1299?

Curtis Volesky, Director of Medicaid Eligibility for the Department of Human Services: Provided informational testimony. **See Testimony #3.**

Chairman Weisz: Any questions?

Representative Conrad: (Inaudible) states that look at (inaudible).

Curtis Volesky: I'm not sure?

Representative Conrad: (Inaudible) can you get that information?

Curtis Volesky: I will certainly do that.

Representative Conrad: If this bill would pass will this allow annuities to be purchased?

Curtis Volesky: If law changed, would not allow us to (inaudible) with their share (inaudible) have income and annuity that he was (inaudible).

Representative Conrad: If we are the only state with interpretation (inaudible) is the department ready to go forth?

Curtis Volesky: Have had appeals and been successful in appeal.

Chairman Weisz: Further questions? Thank you. Hearing closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1299

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: January 21, 2009

Recorder Job Number: 7426 12 min. 54 sec.

Committee Clerk Signature Vicky Crabtree

Minutes:

Gregory Larson, attorney in Bismarck explained to the committee about HB 1299:

This amendment is to clarify that spouses can transfer assets between each other when they are faced with a nursing home situation. The federal law provides a statute for that. The law allows unlimited transfers between spouses in nursing home situations. An annuity bill was passed in 2003 that allows spouses to purchase annuities with the excess assets that are over and above the community spouse resource allowance. Recently the department started disallowing those annuities based on a new reading of the federal law. There have been no changes in the law. The law is the same today as it was in 2003. The Department has a new meaning and has changed their view point on it and now they don't want to allow these annuities to be purchased. My materials will bare out the fact the law hasn't changed and the federal statute is the same. Mr. Volesky refers to a statute in his testimony that says it gives permission for the institutionalized spouse to transfer assets to the spouse that is still living at home. The department's contention is that this provides a limitation on what can be transferred from the spouse in the nursing home to the spouse living at home. You can look through the language and find no language that says anything about any limitation. The language in there says that it is permitted to make this transfer. Federal court allowed a

spouse to buy an annuity and the spouse in the nursing home qualified for Medicaid. That's exactly what the department is now saying we can't do. The department's reading of the federal law is incorrect. We are asking that this bill be passed because it will put language into the bill so we don't have to go to court against the department every time one of these annuities is purchased.

Rep. Porter: In the department's testimony they basically said, go ahead and change the law. They feel they are already aligned with it and this would put us out of compliance. How do we change the wording in this particular bill to make sure that the consumer isn't the one dinged?

Gregory Larson: The language we have makes it clear that transfers are allowed that we've been doing to purchase an annuity. If the department feels they are going to deny despite a state statute, because they feel federal law says something different, we will have to litigate one case to clarify that. If this is passed, the department will know what the legislature wants to do, they won't proceed further. Mr. Krause works with all 50 states and says there is no other state that reads that particular section they way ND is attempting to read it.

Chairman Weisz: (Inaudible). Ruled against it? Pennsylvania did.

Gregory Larson: In that case there were some other issues that they thought they had unique issue that they could sell the annuity and our state's supreme court has (inaudible). These annuities that say they are irrevocable, non-transferable, can't be sold out in the market. There was a specific section in the deficient reduction act says, if you buy an annuity that is irrevocable, non-transferable, actuarially sound and has equal payments, then that annuity will not even be considered an asset to the transfer of asset rules. You are penalized if you give assets away under federal Medicaid laws.

Rep. Nathe: If they put this in the annuity, they are not subject to the 60 month look back period?

Gregory Larson: Correct.

Rep. Nathe: Within in the five year period.

Gregory Larson: Yes, exactly.

Chairman Weisz: Please leave a contact number for us. Thank you.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1299

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: February 9, 2009

Recorder Job Number: 9029

Committee Clerk Signature Vicky Oraktree

Minutes:

Chairman Weisz: Let's look at HB 1299. I don't like to send a bill over to the Senate that isn't completely done, but I've been in conversations with both Greg Larson and (inaudible). I don't have answers on this yet. We could send out with a Do Pass.

Rep. Conrad: Did you get information from Mr. Volesky?

Chairman Weisz: I have that and the facilities argue that (inaudible) looking at the wrong (inaudible) in interpreting this a different way. The question appears to be unanswered. There's not dispute that you can transfer the assets. It doesn't disqualify you. Only disqualifies you, because they take the total of assets. Person in nursing home can transfer all assets to spouse, but they count the total of assets. You can keep $109,000 and if you have more than that, you have to spend down anything you have above that amount. The federal court says annuities that (inaudible) $109,000 don't count and the department says they do.

Rep. Conrad: This bill will allow it.

Chairman Weisz: This bill will allow it. We can sit on this until Monday, but don't think I will get the answer.

Rep. Conrad: Let's pass it.

Rep. Conrad: Motion for a DO PASS.

Rep. Porter: Second.

Roll Call Vote for a DO PASS: 13 yes, 0 no, 0 absent.

MOTION CARRIED FOR A DO PASS.

BILL CARRIER: Rep. Weisz.

FISCAL NOTE

Requested by Legislative Council
01/13/2009

Bill/Resolution No.: HB 1299

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

No fiscal impact is expected. Currently there are no federal restrictions on transfers between spouses for non-spousal impoverishment cases. In spousal impoverishment cases federal law limits the amount that can be transferred to a community spouse. This federal law would supersede the state law.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	Debra A. McDermott	**Agency:**	Human Services
Phone Number:	328-3695	**Date Prepared:**	01/16/2009

Date: 2-9-09

Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1299

House HUMAN SERVICES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ Amended

Motion Made By Rep. Conrad Seconded By Rep Porter

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN ROBIN WEISZ	√		REP. TOM CONKLIN	√	
VICE-CHAIR VONNIE PIETSCH	√		REP. KARI L CONRAD	√	
REP. CHUCK DAMSCHEN	√		REP. RICHARD HOLMAN	√	
REP. ROBERT FRANTSVOG	√		REP. ROBERT KILICHOWSKI	√	
REP. CURT HOFSTAD	√		REP. LOUISE POTTER	√	
REP. MICHAEL R. NATHE	√				
REP. TODD PORTER	√				
REP. GERRY UGLEM	√				

Total (Yes) 13 No 0

Absent 0

Bill Carrier Rep. Weisz

If the vote is on an amendment, briefly indicate intent:

MOTION DO PASS carried

REPORT OF STANDING COMMITTEE

HB 1299: Human Services Committee (Rep. Weisz, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1299 was placed on the Eleventh order on the calendar.

2009 SENATE HUMAN SERVICES

HB 1299

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1299

Senate Human Services Committee

☐ Check here for Conference Committee

Hearing Date: 3/11/09

Recorder Job Number: 10708

Committee Clerk Signature Mary K Monson

Minutes:

Vice Chair Senator Erbele opened the hearing on HB 1299 relating to eligibility for medical assistance.

Greg Larson (Bismarck attorney appearing on his own behalf) testified in favor of HB 1299. Attachment #1

Senator Dever asked what happens if the annuity is co-owned and the at home spouse passes away first.

Mr. Larson replied that the annuity is actually owned by the spouse who is at home. One of the changes made in the statute in 2005 requires that the annuity name the dept. of human services as a beneficiary if the spouse who is at home should pass away first.

There was no opposing testimony.

Curtis Volesky (Director of Medicaid Eligibility, Dept. of Human Services) provided neutral information.

The hearing on HB 1299 was closed.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1299

Senate Human Services Committee

☐ Check here for Conference Committee

Hearing Date: 3/18/09

Recorder Job Number: 11227

Committee Clerk Signature Mary K Monson

Minutes:

Senator J. Lee opened discussion on HB 1299 and asked the Dept. of Human Services for more information.

Julie Leer (Attorney with Dept. of Human Services) introduced Curtis Volesky to discuss annuities and how they work with Medicaid eligibility.

Curtis Volesky (Dept. of Human Services) provided information on HB 1299 covering three primary areas. Attachment #3

Senator J. Lee asked if there are other states that have something similar to ND or permit a large number of dollars to be directed to annuities.

Mr. Volesky didn't have exact numbers on what other states are doing. Some have interpreted the statute to say there is no limits even in the spouse impoverishment cases and some states have taken the same approach as ND.

Senator Dever cited a case where a friend in her early 50's is a new resident of Dacotah Alpha in Mandan. They have gone through the spend down process. He asked what happens if she is in there for several years and then passes away – Is his future income obligated to pay those back expenses.

Mr. Volesky replied that Medicaid could have a claim against the estate, but would not pursue the claim until both spouses are deceased. (Meter 14:10)

Senator J. Lee asked if interest accrues during that time on Medicaid dollars that were spent in order to care for the institutionalized.

Mr. Volesky said his understanding was that interest would not accrue until 6 months after the second spouse passes away.

Senator Erbele referred to the example on the first page of Attachment #3. He asked how four quarters of land and rent from it fits into that.

Mr. Volesky said it's just the value of the asset. He explained that if the land is contiguous to the home it is all exempt until both pass away.

Gregory Larson (Meter (18:00) provided a summary of information he felt was important to the issues at hand. Attachment #4

Senator J. Lee asked Mr. Volesky and Mr. Larson how many people currently might be affected.

Mr. Volesky answered that they obviously disagree with Mr. Larson on what the federal law says. (Meter 33:00) There could be a lot of individuals affected. He spoke about the impact of unlimited transfers on the state.

Mr. Larson responded that he interpreted the question as being how many people are taking advantage of the statute as it is now. If the department continues to take the position it is taking now there would be nobody that could use the annuity statute. The statute is very complicated. He feels it just allows ND citizens to use something federal law says it allows.

Senator J. Lee - summarized - In Mr. Larson's opinion federal law permits it, in Mr. Volesky's opinion federal law does not permit it.

Senator Heckaman asked Mr. Volesky what led them to make this change in the policy.

Mr. Volesky said the policy changed in about 2003. They identified that they were being more liberal than the statute was allowing them to be.

Senator J. Lee asked Mr. Volesky what happens if this is passed and the feds agree with him.

Mr. Volesky replied that in his opinion they would have to follow the federal law.

Senator J. Lee said it would make it easier if they knew what the feds meant.

Mr. Larson reported that he hadn't heard anything from a federal standpoint on any of the annuities that have been sold under this statute since it came into place. (Meter 39:30)

Ms. Leer (Dept. of Human Services) read opinions relating to the cases discussed by Mr. Larson in his testimony. (Meter 41:00) She also talked about the Deficit Reduction Act.

Carlee McLeod (Attorney) stated that she reviewed the letters that came out from CMS to the state providers right after the Deficit Reduction Act came out. She offered to bring them in or bring a memo to simplify it.

Senator J. Lee (Meter 48:00) struggles with the fact that the experts in the field disagree. Discussion followed on what CMS had in mind and that this is a philosophical discussion. Why would Congress have set up all the detailed statutes on how to establish how much a community spouse could have if they wanted them to keep it all? And if they wanted them to keep it all why would they say they could keep it all only if they set it up in a certain type of annuity?

ND statute has stricter requirements regarding this annuity than what the federal law allows. There was continued discussion concerning what the possible impact on ND would be. Attempts to get a firm reading from CMS have been difficult. Answers were limited and mixed.

Senator J. Lee asked if there is any risk or penalty to ND if this passes and the feds say we can do it.

Mr. Volesky replied that if CMS comes out with a directive that says this is the policy that we have to follow and we don't follow it they can sanction us.

Senator J. Lee - If this is passed would be appropriate to include some language that would legislatively enable making changes required if needed. (Meter 62:00)

Ms. Leer thought that if CMS came down with a ruling that something in state law was contrary to what's required from the federal the state would be in a position where they could just do it. (Meter 64.25) The committee felt they were left with a philosophical discussion. Do they want to permit the additional money to go to the community spouse or should it go to support the institutionalized spouse?

Why do we need the bill if the federal law trumps state law?

Would there be a fiscal impact if this is passed?

Senator J. Lee offered to send a message to Sherry at NCSL to see if she could get some clarification.

Committee discussion was put on hold until she could get an answer back.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1299

Senate Human Services Committee

☐ Check here for Conference Committee

Hearing Date: 3/24/09

Recorder Job Number: 11504

Committee Clerk Signature Mary K Monson

Minutes:

Senator J. Lee opened committee work on HB 1299 to look over information received from NCSL. Attachment #5

The committee discussed that this only happens to a small window of people. The idea of not impoverishing a spouse is a fine idea. This is for those who have more than what the maximum is but not lots more. They can shelter part of it by buying an annuity that provides them with additional monthly income. The legal aspect of this was questioned.

Senator J. Lee felt the department believes they will be in trouble with the Medicaid reimbursement if this passes.

There was discomfort it doing this without confirmation from CMS that this is an acceptable transfer. Committee members indicated that they really didn't like this and were leaning toward a do not pass. There was a feeling that it could hinder the Medicaid program and creates dishonesty.

Senator Marcellais moved a **Do Not Pass**.

Second by **Senator Erbele**.

Roll call vote 5-0-1 (**Senator Dever**) **Motion carried.**

Carrier is **Senator J. Lee**.

Date: 3/24/09

Roll Call Vote #: _____

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. HB 1299

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Rerefer to Appropriations

☐ Adopt Amendment ☐ Reconsider

Motion Made By Sen. Marcellais Seconded By Sen. Erbele

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee, Chairman	✓		Senator Joan Heckaman	✓	
Senator Robert Erbele, V.Chair	✓		Senator Richard Marcellais	✓	
Senator Dick Dever			Senator Jim Pomeroy	✓	

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator J. Lee.

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1299: Human Services Committee (Sen. J. Lee, Chairman) recommends **DO NOT PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1299 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1299

January 20, 2009

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
HB #1299

CHAIRMAN KEISER AND COMMITTEE MEMBERS:

My name is Gregory C. Larson. I am an attorney in Bismarck appearing here today on my own behalf. I testify today in support of House Bill 1299.

In 2003, I worked with this committee and the legislature in introducing the original legislation permitting the purchase of certain annuities by spouses of individuals in a nursing home. This bill passed both chambers unanimously. It was also supported by the testimony of Donna Suckut, who was a citizen of North Dakota affected by this bill. Please also recall that the North Dakota Department of Human Services testified in support of this legislation. Please refer to the attached copies of my written testimony from 2003 along with Mrs. Suckut's testimony.

The typical use of this annuity purchase occurs where one spouse is in a nursing home and the other spouse lives at home but has assets in excess of the spousal resource allowance (community spouse asset allowance – CSAA) which is currently one-half of the couple's countable assets provided the one-half does not exceed the maximum of $109,560 and is greater than the minimum of $21,912. If, for example, that excess amount was $100,000 and the at home spouse's share (CSAA) was $100,000, the at home spouse could purchase an annuity that would pay her a monthly income for her life expectancy.

In 2003, the legislature determined that the purchase of annuities by community spouses (at home spouse) with the couple's excess assets was necessary legislation because:

1. It provided an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home;
2. It provided statutory authority for what has generally been the law of the land in the United States since 1994;
3. The at-home spouse would likely have enough income so that she would not become impoverished and go on welfare while the institutionalized spouse is still living;
4. If the institutionalized spouse passes away, then the at-home spouse will lose the institutionalized spouse's social security, and thus, have additional need for this guaranteed annuity income; and
5. If the at-home spouse went into a nursing home, the annuity income would be available to pay for the nursing home cost.

In 2005 and 2007, the law in question was amended to provide that the North Dakota Department of Human Services (DHS) must be named as the primary beneficiary up to the amount of nursing home assistance paid on behalf of the institutionalized spouse. This was done at the Department's request. With my

involvement common ground was reached enabling this legislation to also pass unanimously.

However, recently DHS has denied eligibility for medical assistance when this type of annuity was involved. DHS contends that Federal law prohibits the at home spouse from receiving more than the community spouse asset allowance (CSAA) from the institutionalized spouse. Since the at home spouse's assets are already maxed out at the CSAA, by taking this position, DHS has effectively circumvented the law and clear legislative intent established in 2003 and continuing each legislative session thereafter.

DHS erroneously contends that this bill would be contrary to Federal law. Contrary to DHS's position, transfers between spouses are not limited by Federal law. Because DHS has taken this position contrary to the legislature's intent in 2003, 2005, and 2007, the bill currently before you is necessary to protect the citizens of North Dakota from overreaching by DHS, guarantee North Dakota citizens the same rights under Medicaid as citizens from other states, and to uphold the well-established intentions of our lawmakers.

It is also expected that DHS will allege that a change in the Federal law prompted its recent determinations to deny Medicaid to applicants whose spouses purchase an annuity under the law that was unanimously passed in 2003, and amended in 2005 and 2007. It is unknown what date DHS contends that the law was changed. Based on my research, however, the date is irrelevant because the law in this regard was not changed and has remained consistent since 2003.

I respectfully request that the Committee give this bill a do pass. I thank you for your time and consideration. I would be glad to answer any questions that you may have.

Same handout given to Senate.

February 26, 2003

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
SB #2384

CHAIRMAN KEISER AND COMMITTEE MEMBERS:

My name is Donna Suckut. I am a resident of Fargo, North Dakota and am appearing here today on my own behalf.

I am in favor of this bill because it will allow me to receive a guaranteed amount of income to provide for my retirement years.

My husband, Vernon, is in a nursing home in Fargo. In addition to our home and automobile, which are exempt, we have assets of approximately $180,000.

I am allowed to exempt $90,660 of the $180,000. This leaves approximately $90,000. This bill would allow me to purchase an annuity for $90,000 that would pay me a monthly income of approximately $700. My social security is $341. My Medicare payment is $58, and my Blue Cross/Blue Shield is $93, leaving me a net amount of $189. My husband's social security is $817, less his Medicare and his Blue Cross/Blue Shield premiums, leaving him a net of $643, for a total of $832. We have other miscellaneous income of approximately $240 per month.

Therefore, if I was allowed to purchase an annuity that would provide $700 a month, my total monthly income while my husband is living would be $1,772. This is less than the minimum needs allowance of $2,267. If my husband was to pass away, I would receive the larger of the two social securities, and my total monthly income would then be $1,583 per month. My husband is 79 years old and I am 69 years old. My life expectancy is approximately 16 years. I will need the income of $700 per month from this annuity so that I can live independently without government assistance.

I am afraid that if I have to spend the $90,000 on my husband's care instead of purchase the annuity, then I will become impoverished at some point during the remainder of my life and will not be able to live independently.

I would like to be able to pay for all of my husband's care in the nursing home, but I know this will not leave me with enough income to live. If I should go into a nursing home, the income that I receive from an annuity would be available to help pay for my care.

I respectfully request that this bill be passed. I would be glad to answer any questions.

Same handout given to Senate.

February 26, 2003

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
SB #2384

CHAIRMAN KEISER AND COMMITTEE MEMBERS:

My name is Gregory C. Larson. I am an attorney here in Bismarck appearing here today on my own behalf.

I support this bill because it provides an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home.

The bill provides that if a person purchases an annuity, it will not be a transfer that disqualifies a person from receiving medical assistance if the annuity:

1. is irrevocable and non-assignable;
2. provides equal monthly payments of principal and interest;
3. will return the full principal and interest within the purchaser's lifetime; and
4. has monthly payments that do not exceed the Minimum Monthly Maintenance Needs Allowance (MMMNA) which is $2,267 for 2003.

This bill would provide statutory authority for what has generally been the law of the land in the United States since 1994. In 1994, the Health Care Financing Administration (HCFA) issued transmittal letter 64 which stated that if an annuity was purchased that was consistent with the characteristics mentioned above, the purchase would not be considered to be a disqualifying transfer for purposes of qualifying for medical assistance. HCFA had oversight federally regarding medical assistance and most states follow the guidelines of transmittal letter 64. The North Dakota Department of Human Services (NDDHS) has also by letter to legal counsel approved the use of such an annuity in medical assistance planning that was consistent with transmittal letter 64. (See attached letter.)

However, recently DHS has denied eligibility for medical assistance when this type of annuity was involved. Thus, the need arises for statutory clarification of this area for the general public.

The typical use of this annuity purchase occurs where one spouse is in a nursing home and the other spouse lives at home but has assets in excess of the spousal resource allowance of $90,660. If, for example, that excess amount was $100,000, the at home spouse could purchase an annuity that complied with this bill that would pay her a monthly income for her life expectancy. This would do three very good things:

1. the at-home spouse would likely have enough income so that she would not become impoverished and go on welfare while the institutionalized spouse is still living;

2. if the institutionalized spouse passes away, then the at-home spouse will lose the institutionalized spouse's social security, and thus, have additional need for this guaranteed annuity income; and

3. if the at-home spouse went into a nursing home, the annuity income would be available to pay for the nursing home cost.

If the purchase of this $100,000 annuity was not allowed by NDDHS, then the only other planning available would be to give the $100,000 away. If this was done, the use of the $100,000 to pay expenses would be lost to this husband and wife and would likely pass to the next generation escaping any responsibility for the care of the parents.

Finally, it should be noted that this bill provides a cap on the amount of income that can be generated from the annuity at the level of the MMMNA established by the NDDHS in medical assistance cases, which is $2,267/month in 2003.

Proposed Amendments by the North Dakota Department of Human Services.

At the Senate Industry, Business and Labor Committee hearing on this bill, the Department submitted testimony and amendments that would negate the intended purpose and benefit of this bill. Blaine Nordwall, Director of Economic Assistance policy for the Department of Human Services, testified that "annuities have become the latest tool used by couples who want to avoid the asset limits". As stated previously, this use of annuities has been the law of the land since 1994 and has been used nationwide since that time.

These suggested amendments by the Department are not needed. The bill, as it is, is very straight forward and clear in its intended application and use. Mr. Nordwall's testimony was that "Federal instructions say we must consider annuities purchased for retirement purposes as income and not as an asset". The very nature of the proposed bill satisfies this concern because transmittal letter 64 provided that if its guidelines were followed regarding a full return of principal and interest within the purchaser's life expectancy that the annuity would be considered to be for retirement purposes and not as a mechanism for transferring wealth to the next generation.

The suggested amendments voiding the "non-assignment" clause would completely eliminate the benefit and protection of this bill. If the annuity could be assigned, then it could be sold and produce cash that would cause the Medicaid applicant to exceed asset limits and be disqualified for medical assistance. Also, if the annuity was assignable, the annuitant could assign all of the benefits to the next generation and eliminate the guarantee that the money spent on the annuity would be used for the benefit of the parents' generation.

I respectfully request that the Committee give this bill a do pass. I thank you for your time and consideration. I would be glad to answer any questions that you may have.

House Bill 1299
House Human Services
January 20, 2008

Chairman Weisz, members of the committee, my name is Carlee McLeod, and I come before you representing the North Dakota Chapter of the National Academy of Elder Law Attorneys in support of House Bill 1299.

This bill is intended to clarify language from legislation enacted in 2003 which sought to protect a community spouse from impoverishment. This area of law is very technical, and it's easy to get bogged down in the terms and regulations regarding Medicaid eligibility and administration. In its most simple terms, this is a bill to ensure that practices are consistent with both Medicaid law and legislative intent. Most importantly, this bill is necessary to provide clear guidelines to people planning for their retirement and elder years so that they may provide proper support for themselves or their spouses if a spouse becomes institutionalized.

In order to explain to you what this bill does, let me first tell you what this bill does not do. It does not run contrary to federal law, as the fiscal note would have you believe. Federal Medicaid law does not prohibit the transfer of assets between spouses prior to Medicaid eligibility. Federal Medicaid law has not changed since 2003 when the legislature originally passed this law unanimously. Since that time, the citizens of North Dakota have been buying annuities as part of the spend-down process. Now, the Department of Human Services has taken the position that they can't continue buying annuities on the basis that they can't transfer assets between spouses except to bring the community spouse up to the community spouse asset allowance (CSAA). Since the community spouse's assets are already at the CSAA, the annuity law that passed both

chambers unanimously in 2003 has effectively been overruled by the Department's position.

When a spouse enters a nursing home, federal law provides for an assessment of the couple's assets with values determined on the day the spouse enters the nursing home. 42 USC 1396f-5(c)(1). While a spousal share is calculated from that assessment, the property may be owned jointly or separately. The spousal share is solely a marker of value; it does not attach any certain asset to a particular spouse. This assessment is done regardless of when the institutionalized spouse applies for Medicaid.

Federal Medicaid law provides that spouses can transfer assets freely between themselves prior to Medicaid eligibility. After the point of eligibility, assets may only be transferred as provided by law. 42 USC 1396f-5(c)(2). This bill does nothing to change that.

The above described process does not prohibit asset transfers prior to eligibility. This process was studied carefully when this legislation was first enacted, and despite the Deficit Reduction Act of 2006 which had an impact on Medicaid law, the provisions allowing transfer of assets between spouses has remained the same.

That leads me to what this bill actually does. This bill provides ensures that North Dakota law is consistent with federal Medicaid law. It allows the citizens of North Dakota to do what the citizens of all other states are allowed to do. Aside from an assessment of assets at the time of institutionalization, there are no restrictions on transfers of assets between spouses between the time of institutionalization and application for Medicaid, and we need to make that clear in our North Dakota law. As

the North Dakota law stands now, couples who properly plan for their financial future are being denied eligibility because of some of the transfer tools used prior to eligibility and in direct contradiction to what our legislation intended in 2003 and subsequent sessions.

Long term retirement planning is a nuanced practice with many unknowns. We rely on the certainty of the law to provide a little peace of mind when facing the unknown. This bill allows for the flexibility federal Medicaid law already allows, and our elderly deserve the right it gives them to protect their future dignity and security.

We urge a DO PASS recommendation from this committee so that we can continue to assist the elderly in planning for their future without uncertainty.

#2

Testimony
House Bill 1299 – Department of Human Services
House Human Services Committee
Representative Robin Weisz, Chairman
January 20, 2009

Chairman Weisz, members of the Human Services Committee, I am Curtis Volesky, Director of Medicaid Eligibility for the Department of Human Services. The Department is here today to provide information on House Bill 1299.

In order to receive federal funding for the Medicaid program, the state is required to follow federal policy, including policy relating to transfers between spouses. That policy, found at 42 U.S.C. 1396p(c)(2)(B), and which is required to be followed by Medicaid, already allows unlimited transfers between spouses in most cases. The exception is for spousal impoverishment situations, where transfers from a spouse receiving long-term care services are limited.

Spousal impoverishment policy is based on federal statute at 42 U.S.C. 1396r-5 which provides specific rules for determining eligibility for an individual receiving long-term care that has a spouse that resides in the community. Spousal impoverishment allows the community spouse to keep a higher amount of income and assets, but does establish some limits. Section 42 U.S.C. 1396r-5 supersedes any other Medicaid statute that is inconsistent with it, including the above mentioned 42 U.S.C. 1396p(c)(2)(B) which allows unlimited transfers between spouses.

Subsection (f) of 42 U.S.C. 1396r-5 addresses transfers that are permitted between spouses, and limits those transfers to an amount equal to the community spouse resource allowance. It also allows additional time to

complete the transfer after Medicaid eligibility is determined.

The community spouse resource allowance is specifically defined and limited in the statute (42 U.S.C. 1396r-5(f)(1)). In determining eligibility in spousal impoverishment cases, a spousal share is determined as of the date one spouse begins receiving long-term care services. The spousal share is equal to one-half of all countable assets owned by the couple. The community spouse is allowed to keep this spousal share; however, if the amount is above the maximum allowed under federal law, $109,560 for 2009, the community spouse must spend down the excess. If the community spouse's share is below $21,912 (the minimum for 2009), he or she can keep more than their share so they have at least this minimum amount. It does not matter which spouse actually owns the assets. At the point eligibility is established, if the community spouse does not have the total amount of assets that the community spouse can keep listed in his or her name, the institutionalized spouse can transfer assets to the community spouse to bring the community spouse up to that amount. The amount that can be transferred is called the community spouse resource allowance.

Example:

- Spousal share is $125,000.
- This is above the maximum, so the community spouse can keep $109,560.
- Only $30,000 is in the community spouse's name.
- The community spouse resource allowance is $79,560 ($109,560 - $30,000 = $79,560). Which means the community spouse can receive $79,560 of assets via transfer from the institutionalized spouse, without a disqualifying transfer penalty.

This transfer between spouses is not disqualifying, but transfers in excess of

this amount are subject to the disqualifying transfer provisions. Couples are allowed up to one year after Medicaid eligibility is determined to transfer the assets to the community spouse.

House Bill 1299 does not align with federal Medicaid law, and may negatively impact applicants and recipients of Medicaid. The statutes at N.D.C.C. 50-24.1-02 apply to applications for Medicaid. Institutionalized spouses who anticipate future Medicaid coverage may make transfers based on this statute, believing that there are no limits, but if they then apply for Medicaid under the spousal impoverishment provisions, they could be subject to a penalty period.

I would be happy to address any questions that you may have.

#1

MARCH 11, 2009

SENATE HUMAN SERVICES COMMITTEE
HB #1299

CHAIRMAN LEE AND COMMITTEE MEMBERS:

My name is Gregory C. Larson. I am an attorney in Bismarck appearing here today on my own behalf. I also have been the North Dakota State Director of the National Academy of Elder Law Attorneys (NAELA) since 1991. I testify today in support of House Bill 1299.

This bill amends section 50-24.1-02 of the North Dakota Century Code to include the language "does not include transfers of assets between spouses" to clarify that it is not a Medicaid disqualifying transfer to use assets of a Medicaid couple to purchase an annuity for the at home spouse.

In 2003, I worked with this legislature in introducing the original legislation permitting the purchase of certain annuities by spouses of individuals in a nursing home. This bill passed both chambers unanimously. It was also supported by the testimony of Donna Suckut, who was a citizen of North Dakota affected by this bill. Please also recall that the North Dakota Department of Human Services testified in support of this legislation. Please refer to the attached copies of my written testimony from 2003 along with Mrs. Suckut's testimony.

The typical use of this annuity purchase occurs where one spouse is in a nursing home and the other spouse lives at home but has assets in excess of the spousal resource allowance (community spouse asset allowance – CSAA) which is currently one-half of the couple's countable assets provided the one-half does not exceed the maximum of $109,560 and is greater than the minimum of $21,912.

If, for example, the total non-exempt assets of a couple was $200,000 the at home spouse's asset allowance (CSAA) would be $100,000. The couple would have remaining $100,000 considered to be excess assets and they would not qualify for Medicaid until this excess $100,000 was spent down. The current ND annuity statute allows the at home spouse to purchase an annuity with the excess $100,000. The annuity would be exempt and would pay the at home spouse a monthly income for her life expectancy. This example is virtually identical to Donna Suckut's situation.

In 2003, the legislature determined that the purchase of annuities by community spouses (at home spouse) with the couple's excess assets was necessary legislation because:

1. It provided an alternative to the practice of giving assets away to qualify for medical assistance when in a nursing home;
2. It provided statutory authority for what had generally been the law of the land in the United States since 1994;

3. The at-home spouse would likely have enough income so that she would not become impoverished and go on welfare while the institutionalized spouse was still living;
4. If the institutionalized spouse passed away, the at-home spouse would lose the institutionalized spouse's social security income, and thus, have additional need for this guaranteed annuity income; and
5. If the at-home spouse went into a nursing home, the annuity income would be available to pay for the nursing home cost.

In 2005 and 2007, the annuity statute was amended to provide that the North Dakota Department of Human Services (DHS) must be named as the primary beneficiary up to the amount of nursing home assistance paid on behalf of the institutionalized spouse. This was done at the Department's request. With my involvement, common ground was reached enabling this legislation to also pass unanimously.

However, recently DHS has denied eligibility for Medicaid for couples when this type of annuity was purchased. DHS contends that Federal law prohibits the at home spouse from receiving more than the community spouse asset allowance (CSAA). This means that the remaining $100,000 in the example above cannot be used by the at home spouse to purchase an annuity that will provide a lifetime income stream. Instead, the $100,000 must be spent before the couple will qualify for Medicaid. Therefore the at home spouse will have to try to live on the $100,000 CSAA rather than having the $100,000 CSAA and a modest monthly income available for support. By taking this position DHS has effectively circumvented the law and clear legislative intent established in 2003 and which continued each legislative session thereafter.

DHS erroneously contends that this bill would be contrary to Federal law. Contrary to DHS's position, transfers between spouses are not limited by Federal law. Because DHS has taken this position contrary to the legislature's intent in 2003, 2005, and 2007, the bill currently before you is necessary to protect the citizens of North Dakota from overreaching by DHS, to guarantee North Dakota citizens the same rights under Medicaid as citizens of other states, and to uphold the well-established intentions of our lawmakers.

Curtis Volesky, Director of Medicaid Eligibility for the Department of Human Services, testified on January 20, 2009 regarding this bill. Part of that testimony was his statement that subsection (f) of 42 U.S.C. 1396r-5 limits transfers between spouses to the Community Spouse Resource Allowance. That is an incorrect interpretation of that section. Subsection (f) provides that:

> An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the Community Spouse Resource Allowance as defined in paragraph (2), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

The purpose of this section is to allow the institutionalized spouse to transfer assets, owned by the institutionalized spouse, over to the community spouse to fully fund the community spouse's resource allowance. Nowhere in that section is there a reference that this is the limit of assets that may be transferred between spouses. Subsection (f) merely allows these transfers of assets to be made after the date of the initial determination of eligibility for Medicaid has been made. Subsection (f) does not contain any language limiting the transfers between spouses to the Community Spouse Resource Allowance as the Department of Human Services contends.

Other sections of the federal Medicaid laws state that there is no limitation to the amount of transfers between spouses. Subsection (2)(B) of 42 U.S.C. 1396p provides that an individual will not be ineligible for medical assistance by reason of a transfer of assets to the extent that the assets were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse. This subsection is the controlling section that specifically allows unlimited transfers between spouses.

Contrary to the testimony of Curtis Volesky, House Bill 1299 does align with federal Medicaid law, including the latest changes made by the Deficit Reduction Act of 2005. Subsection (c)(1)(G) of 42 U.S.C. 1396p (of the DRA) provides that with respect to a transfer of assets, the term "assets" includes an annuity purchased on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services unless the annuity is a retirement annuity or a non-retirement annuity that is irrevocable, non-assignable, actuarially sound and provides for equal payments.

House Bill 1299 is amending North Dakota's annuity laws for Medicaid purposes to clarify that there is no limitation on transfers between spouses. Subsection (c)(1)(G) mentioned above clarifies that a transfer of assets includes an annuity unless the annuity is irrevocable, non-assignable, actuarially sound, and provides for equal payments. North Dakota's annuity statute has those requirements and therefore an annuity purchased in compliance with North Dakota's annuity statute complies with federal law and would not even be considered to be an asset with respect to the transfer of asset rules and penalties.

The annuity statute contained in N.D.C.C. § 50-24.1-02 was in compliance with federal Medicaid law when it was enacted and is still in compliance with federal Medicaid law with the change contained in House Bill 1299. The Department of Human Services has agreed that the statute was in compliance with federal law until it recently changed its opinion as stated in Curtis Volesky's testimony.

Further, proof that the North Dakota law is in compliance with federal law is contained in the case of *James v. Richman*. That case was decided November 12, 2008 by the Third Circuit Court of Appeals and cited as *James v. Richman*, (3rd Cir, No. 06-5092, Nov. 12, 2008). In that case, Mrs. James transferred assets to an insurance company to purchase an annuity. The Pennsylvania Department of Human Services objected and the federal Court of Appeals determined that the purchase of the annuity was

proper and allowed by federal Medicaid laws. And the Federal District Court in Pennsylvania decided in Weatherbee v. Richman on January 22, 2009 which allowed an at home spouse to use the couple's assets in excess of the CSAA to purchase an annuity and still qualify for Medicaid.

This bill passed unanimously through committee and the floor in the House. I respectfully request that this Committee give this bill a do pass. I thank you for your time and consideration. I would be glad to answer any questions that you may have.

#2

Testimony
House Bill 1299 – Department of Human Services
Senate Human Services Committee
Senator Lee, Chairman
March 11, 2009

Chairman Lee, members of the Human Services Committee, I am Curtis Volesky, Director of Medicaid Eligibility for the Department of Human Services. The Department is here today to provide information on House Bill 1299.

To receive federal funding for the Medicaid program, the state is required to follow federal policy, including policy relating to transfers between spouses. That policy, found at 42 U.S.C. 1396p(c)(2)(B), and which is required to be followed by Medicaid, allows transfers between spouses. This statute, however, is limited by section 42 U.S.C. 1396r-5, which addresses the spousal impoverishment provisions. Section 1396r-5(a)(1) specifically states that section 1396r-5 supersedes any other Medicaid statute that is inconsistent with it, including the previously mentioned Section 1396p(c)(2)(B). Section 1396r-5 limits transfers when one spouse is receiving long-term care services and the community spouse is not covered by Medicaid. These statutes, taken together, allow unlimited transfers between spouses before one becomes an institutionalized spouse, but subjects them to the federal limitation in section 1396r-5 after one spouse becomes institutionalized. For your information and review, I have attached a copy of the relevant statutes. (A)

Spousal impoverishment provisions allow the community spouse to keep a higher amount of income and assets than is allowed for other couples with

Medicaid coverage ($2267 or more in income versus $500, and up to $109,560 in assets versus $3000), but the provisions do establish limits. Subsection (f) of 1396r-5 speaks to transfers that are permitted from an institutionalized spouse to a community spouse, and excepts those transfers from being considered disqualifying transfers. It specifically limits those transfers to an amount equal to the community spouse resource allowance as defined in the statute (42 U.S.C. 1396r-5(f)(1)). It also allows additional time to complete the transfer after Medicaid eligibility is determined.

In determining eligibility in spousal impoverishment cases, a spousal share is determined as of the date one spouse begins receiving long-term care services. The spousal share is equal to one-half of all countable assets owned by the couple. The community spouse is allowed to keep this spousal share; however, if the amount is above the maximum allowed under federal law, $109,560 for 2009, the community spouse must spend down the excess. If the community spouse's share is below $21,912 (the minimum for 2009), he or she can keep more than their share so they have at least this minimum amount. It does not matter which spouse actually owns the assets. At the point eligibility is established, if the community spouse does not have the total amount of assets that the community spouse can keep listed in his or her name, the institutionalized spouse is permitted to transfer assets to the community spouse to bring the community spouse up to that amount. The amount that can be transferred is the community spouse resource allowance. I've included two examples; one in which the spousal share is in excess of the maximum permitted, and one in which it is less.

Example 1:

- Spousal share is $125,000 (from total marital assets of $250,000 which does not include the home, the car, or burial plans).

- This is above the maximum, so the community spouse can keep $109,560.
- Only $30,000 is in the community spouse's name.
- The community spouse resource allowance is $79,560 ($109,560 - $30,000 = $79,560). Which means the community spouse can receive $79,560 of assets via transfer from the institutionalized spouse, without a disqualifying transfer penalty.

Example 2:

- Spousal share is $75,000 (from total marital assets of $150,000 which does not include the home, the car, or burial plans).
- This is below the maximum of $109,560 and above the minimum of $21,912 so the community spouse can keep all $75,000.
- Only $25,000 is in the community spouse's name.
- The community spouse resource allowance is $50,000 ($75,000 - $25,000 = $50,000). Which means the community spouse can receive $50,000 of assets via transfer from the institutionalized spouse, without a disqualifying transfer penalty.

A transfer between spouses up to the community spouse resource allowance is not disqualifying, but transfers from the institutionalized spouse in excess of that amount are subject to the disqualifying transfer provision at 1396p(c)(1). Under section 1396r-5(f)(1), couples are allowed up to one year after Medicaid eligibility is determined to transfer the assets to the community spouse.

It is not the intent of the spousal impoverishment statute to allow community spouses to keep all assets and then have the taxpayers pay for the nursing care costs through Medicaid. If that were the intent, there

would be no need to determine a spousal share or a community spouse resource allowance at the time one spouse enters a nursing facility; and the statute would not limit the amount that can be transferred to a community spouse after institutionalization. It would simply provide that the community spouse is allowed to keep all of the assets.

Previous testimony provided in the House stated that "House Bill 1299 is amending North Dakota's annuity laws for Medicaid purposes to clarify that there is no limitation on transfers between spouses." This bill is not about annuities, nor is it amending the annuity statutes. It is about the amount of assets a community spouse may keep when their spouse enters nursing care, which is a separate issue. Annuities allowed under North Dakota and federal statutes may still be purchased, and are not affected by this bill. North Dakota's Medicaid program follows both the state and federal annuity statutes which state that the purchase of an annuity is not disqualifying, and the annuity is not countable as an asset, if it meets the criteria indicated in the statutes.

It has also been stated in previous testimony that by limiting the amount of assets that can be transferred to the community spouse, it limits the amount of annuity income that can be made available to the community spouse. This is in reference to the state statute that indicates annuity income, along with the community spouse's other income, cannot exceed 150% of the community spouse's maintenance allowance. A community spouse's income can be increased to that level when part of that income is from an annuity purchased with the community spouse's share, but it cannot be increased beyond 100% of the community spouse maintenance allowance using assets from the institutionalized spouse's share. Section 1396r-5(e) establishes a method to adjust the community spouse monthly maintenance allowance or

the community spouse resource allowance if a couple is not satisfied with a determination of the computation of the spousal share or the community spouse resource allowance. The prescribed method allows an increase only if the assets available to the community spouse are inadequate to raise the community spouse's income up to the maintenance allowance. It does not allow an increase in the community spouse resource allowance to exceed it.

Testimony provided in the House also questioned the Department's interpretation of the federal statutes and indicated that a federal court has allowed the transfers proposed by this bill, however, the court case cited was not about spousal transfers, but was about whether an annuity was a countable asset. The Department is not aware of any federal court case that actually addresses the issue of spousal transfers when one spouse becomes institutionalized. (The Department currently has an appeal pending of a Medicaid case on this issue. That appeal process will include a review of the statutes in question and determine whether the Department's interpretation of these statutes is accurate.)

To the extent that House Bill 1299 purports to allow transfers between spouses that would exceed the community spouse resource allowance, it does not align with federal Medicaid law, and may result in a negative impact on applicants and recipients of Medicaid. The statutes at N.D.C.C. 50-24.1-02 apply to applications for Medicaid. Institutionalized spouses who anticipate future Medicaid coverage may make transfers based on this statute, believing that there are no limits, but if they then apply for Medicaid under the spousal impoverishment provisions, they could be subject to a penalty period.

I would be happy to address any questions that you may have.

(A)

North Dakota Department of Human Services
Attachment to Testimony for HB 1299
March 11, 2009

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(c) Taking into account certain transfers of assets

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

(B) the assets—

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

§ 1396r–5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a (a)(17) and 1396a (f) of this title) which is inconsistent with them.

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(c) Taking into account certain transfers of assets

(1)

(A) In order to meet the requirements of this subsection for purposes of section 1396a (a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

[emphasis added]

§ 1396r–5. Treatment of income and resources for certain institutionalized spouses

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p (c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which—

(A) the greatest of—

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of

(I) the spousal share computed under subsection (c)(1) of this section, or

(II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

[emphasis added]

§ 1396r–5. Treatment of income and resources for certain institutionalized spouses

(e) Notice and fair hearing

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a (a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

[emphasis added]

#3

HB 1299 - Information

1. Medicaid Eligibility:

- Single individual - allowed $3000 in countable assets and a burial.
  - Personal needs allowance is $50 with remaining income as recipient liability.
- Couple where both are on Medicaid - allowed $6000 in countable assets and a burial for each.
  - Personal needs allowance is $50 each if both are in the nursing home and remaining income is recipient liability, or
  - If one is in nursing home, personal needs allowance of $50 and spouse at home is allowed $500. Remaining income of institutionalized spouse is recipient liability.
- Spousal impoverishment case - institutionalized spouse allowed $3000 in countable assets. Community spouse allowed half of countable assets within minimum and maximums. Each is allowed a burial.
  - Personal needs allowance is $50 for institutionalized spouse with remaining income as recipient liability.
  - Community Spouse keeps all of own income; if less than $2267 then Institutionalized Spouse gives income up to that amount.
- Asset assessment at entry available to identify countable assets, amount the couple can keep, and the amount to spend down.

2. Transfers between spouses:

- Non-spousal - No limits as both responsible for each other and all is countable.
- Spousal - Disregard of Community Spouse's protected amount, then after eligibility is established, no longer look at Community Spouse's assets.
- Institutionalized Spouse allowed to transfer assets to Community Spouse to insure Community Spouse has protected share, but only to bring up to Community Spouse amount (Community Spouse Resource Allowance).

Example: Assets owned by couple at assessment

Home (exempt)

1 vehicle (exempt)

Cash in bank $20,000

Certificates of Deposits $250,000

Total countable: $270,000 (each spouse's share = $135,000)

Institutionalized Spouse gets $3000

Community Spouse gets $109,560

Total couple gets to keep $112,560

$157,440 needs to be spent down

Spend down:

Purchase a $5000 burial for each

Pay off mortgage on home for $30,000

Pay off joint credit cards and other bills for $20,000

$97,440 remaining to spend down

Community Spouse could buy an exempt annuity with remainder of Community Spouse's share $135,000-109,560 = $25,440

That leaves $72,000 that can be applied to Institutionalized Spouse's care

(13.2 months)

- Under the proposed change, the $72,000 would be used to purchase an annuity for Community Spouse and Institutionalized Spouse becomes eligible.
- Cost to state: $72,000

3. Annuities:

- Federal and state laws require annuities to meet specific criteria and the annuity must name the state as primary beneficiary after Community Spouse.
  - If it does not, establishing the annuity is a disqualifying transfer if set up within look-back period.
- Employee benefit annuities are not countable assets.
- Other annuities that meet criteria are not countable assets.
- Either spouse (or even a single person) can have an annuity.
- Community Spouse can use any portion of Community Spouse's share to purchase an annuity.
- Institutionalized Spouse can too and may be able to give excess income to Community Spouse, and when dies, Community Spouse can be first beneficiary.
- Per Mr. Larson's testimony, he wants to be able to use the Institutionalized Spouse's share to purchase an annuity for the Community Spouse.
  - Institutionalized Spouse then becomes immediately eligible.
- This is not an issue of whether the annuity is countable, but is a transfer issue.
  - It is a disqualifying transfer if the Institutionalized Spouse's share provided to the Community Spouse is above the Community Spouse Resource Allowance allowed under federal law.

#4

HOUSE BILL 1299
SENATE HUMAN SERVICES COMMITTEE
Work Notes 3-18-09

The Department suggests that this bill is contrary to federal Medicaid law. For this assertion, the Department relies on 42 USCA 1396r-5(f)(1). This section states that an institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer to the community spouse an amount equal to the community spouse resource allowance...as soon as practicable after the date of initial determination of eligibility..."

The mistake that the Department makes is that they consider this cited section to be a restrictive and limiting section. However, the language of the statute clearly has no limiting language and refers to "permitting" transfers and that the institutionalized spouse "may" transfer a certain amount to the community spouse. The second sentence of this section makes it clear that this section applies to a situation "after the date of the initial determination of eligibility." Therefore, this section should not be used to in any way deny eligibility which is how the Department is using it in North Dakota.

North Dakota passed the annuity statute in 2003. Six years after its passage, the Department is now raising an issue regarding the above-referenced section saying that this now disqualifies people who purchased a Medicaid annuity. The Department has no explanation as to why it has waited six years before asserting the applicability of the above-mentioned section.

Other provisions of federal Medicaid law allow unlimited transfers between spouses (42 USC 1396p(c)(2)(B)). Other sections of the Deficit Reduction Act of 2005 make it clear that "assets" used to purchase an annuity will not be considered a disqualifying transfer of assets as long as the annuity is irrevocable, unassignable, actuarially sound, and provides for equal payments. (42 USC 1396p(c)(1)(G)). This is exactly what the ND annuity statute provides.

Two recent federal cases decided November 12, 2008 and January 22, 2009 clearly allow unlimited transfers between spouses to allow the purchase of a Medicaid qualified annuity. The Department argues that these cases didn't address the issue of the amount of transfer between the spouses and are therefore not precedential regarding the Department's position. However, those federal cases did not raise the issue that the Department now raises because it is a non-issue regarding qualification for Medicaid. There is no other state that has taken the position that ND is now taking.

By taking the stance the Department is now taking regarding annuities, the Department is attempting to thwart the legislative intent that has been in place since the enactment of this statute six years ago. There are currently five cases where the Department has denied eligibility using its "new" theory.

42 U.S.C.A. § 1396r-5(f)(1)

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p (c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

42 U.S.C.A. § 1396p(c)(1)(F)

(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.

42 U.S.C.A. § 1396p(c)(1)(G)

(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 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 nonassignable;

(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.

#5

Lee, Judy E.

From: Rachel Morgan [rachel.morgan@ncsl.org]
Sent: Tuesday, March 24, 2009 2:43 PM
To: Lee, Judy E.
Subject: Asset Annuity Question HB 1299

Senator Lee,
Sheri sent your questions concerning the asset annuity to Joy and I. Since your timeframe is kind of tight I wanted to keep you in the loop of what is going on. I sent your question to our contact at CMS and she is aware that you need an answer as soon as possible. As soon as I hear from her I'll get back in touch with you.

Joy did happen to mention that the Deficit Reduction Act made some changes in the handling of annuities which may explain some of the confusion in the answers you've received. Here is a summary of the DRA provisions,

DRA, Treatment of Annuities, Section 6012
Requires individuals, upon Medicaid application and recertification of eligibility, to disclose to the state, a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset.

Includes in the definition of assets subject to transfer penalties, an annuity purchased by or on behalf of an annuitant who has applied for Medicaid-covered nursing facility or other long-term care services.

Excludes certain annuities. Annuities that would not be subject to asset transfer penalties would include an annuity as defined in subsection (b) and (q) of section 408 of the Internal Revenue Code (IRC), or purchased with proceeds from:

(1) an account or trust described in subsections (a), (c), and (p) of section 408 of the IRC; (2) a simplified employee pension as defined in section 408(k) of the IRC; or (3) a Roth IRA defined in section 408A of the IRC. Annuities would also be excluded from penalties if they are irrevocable and nonassignable, actuarially sound (as determined by actuarial publications of the Office of the Chief Actuary of the Social Security Administration), and provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

The State as the Remainder Beneficiary (Sec. 6012(b)).
Provides that the purchase of an annuity will be treated as the disposal of an asset for less than fair market value unless the state is named as the remainder beneficiary in the first position for at least the total amount of Medicaid expenditures paid on behalf of the annuitant or 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.

States may require an issuer to notify the state when there is a change in the amount of income or principal withdrawn from the amount withdrawn at the point of
Medicaid application or recertification. States take this information into account when determining the amount of the state's financial share of costs or in the individual's eligibility for Medicaid. The Secretary may provide guidance to states on categories of transactions that may be treated as a transfer of asset for
less than fair market value. States may deny eligibility for medical assistance for an individual based on the income or resources derived from an annuity.

Provisions apply to transactions, including the purchase of annuity, occurring on or after the date of enactment.

I hope this information is helpful. I get back to you when I get an official answer from CMS.

Rachel

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