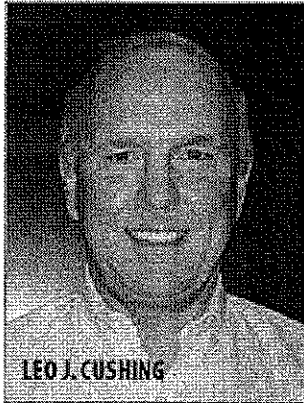


Private annuity does not preclude Medicaid benefits

by Eric T. Berkman

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The creation of a private annuity by a husband did not constitute a transfer of assets that would disqualify his wife from receiving Medicaid disability benefits, a Superior Court judge has ruled.

The annuity was funded by an irrevocable trust to which the husband had sold certain assets in exchange for his daughters' promise, as trustees, to provide him monthly payments.

A hearing officer with MassHealth — the Office of Health and Human Services division that manages the commonwealth's Medicaid program — denied the wife's claim for benefits, finding that the sale of assets was not for fair market value. The officer also found that once the wife received benefits, the husband had no reason to enforce the terms of the annuity.

Accordingly, the hearing officer determined that the sale amounted to a disqualifying wealth transfer, making the wife ineligible for Medicaid.

But Judge Regina L. Quinlan reversed.

"The annuity contract by its express terms is legally and *reasonably enforceable*," wrote Quinlan, granting the wife's motion for judgment on the pleadings. "To disregard the express terms of the annuity agreement would render any contract involving family members or any private annuity a disqualifying transfer regardless of compliance with the provisions of [MassHealth regulations]."

The 10-page decision is *O'Brien v. Division of Medical Assistance Office of Medicaid*, Lawyers Weekly No. 12-125-11. The full text of the ruling can be ordered [by clicking here](#).

Family transactions permissible

Samuel Perkins of Brody, Hardoon, Perkins & Kesten in Boston, who represented the wife, said for the first time estate planners have a court ruling that approves a private annuity as MassHealth regulations say they should be approved.

Leo J. Cushing of Cushing & Dolan in Waltham, who also represented the wife and who drafted the underlying private annuity agreement, said the decision sends an important message that family members should be able to engage in transactions with one another without disqualifying a relative from receiving Medicaid benefits, as long as the terms of such transactions are commercially reasonable and reasonably enforceable.

The ruling is especially important now because the commonwealth has made an internal practice of denying MassHealth applications anytime there has been a transaction between private parties, Cushing said, adding that when the government denies an application and then wins at the appeal hearing, it sends "a chilling effect" to estate planning and elder law practitioners who are considering utilizing such planning tools.

But *O'Brien* affirms that private annuities are permissible in Massachusetts, Cushing continued. "This provides an important planning opportunity to preserve a unique asset while maintaining eligibility for Medicaid."

David J. Correia of Correia & Correia in Swansea, an elder law attorney who was not involved in the case, echoed Perkins's criticism of MassHealth's alleged practice of denying a claim involving family transactions in the hope that the applicant will balk at the expense of litigating further. He said it will be interesting to see whether MassHealth appeals the ruling.

Correira, who successfully challenged MassHealth's denial of benefits in a similar Superior Court case, *Clark v. Dehner*, in 2009, noted that MassHealth did not appeal the ruling in that instance.

"I'd suspect that they may take the same position in this case because they would then want to be able to rely on an argument in the future that each case was limited to its facts as opposed to being substantive legal precedent," he said. "From a legal strategy perspective, MassHealth is trying to keep these cases at the administrative level and the Superior Court level without having them move up further, because they want the bad-facts cases and those involving poorly drafted trusts to get to the Appeals Court and Supreme Judicial Court level so that they muck up the caselaw."

Many lawyers are frustrated by that, Correira said, reiterating that "a lot of clients don't want to spend money [appealing denials of benefits], so they just throw in the towel."

MassHealth spokesperson Jennifer Kritz had no comment other than to say the agency is evaluating the decision and determining how best to proceed.

Private annuity

Plaintiff Laura M. O'Brien, an elderly woman, was admitted to Colonial Rehabilitation and Nursing Center in Weymouth on March 14, 2008.

In June 2008, her husband, Leo, established the "Mr. Leo T. O'Brien Irrevocable Trust," naming their daughters, Lisa Lenzi and Karen Curran, as trustees.

That same month, the husband entered into an irrevocable private annuity agreement with his daughters. Under the agreement, he sold his daughters/trustees a number of life insurance policies and an investment account with an aggregate value of nearly \$600,000.

In return, his daughters, as trustees, promised to pay him \$25,000 a month for two years, beginning that July. In total, presumably with interest, the payouts would amount to about \$606,000.

The annuity also stated that upon the husband's death, the annuity payments would be made to designated beneficiaries. The first designated beneficiary would be the commonwealth for at least the total amount of medical assistance it paid on behalf of the plaintiff.

On Aug. 19, 2008, the plaintiff applied for long-term care benefits with MassHealth, which denied her application, deeming the husband's \$600,000 transfer to the trust a disqualifying transfer of assets. After an administrative hearing, the agency denied her administrative appeal.

The plaintiff appealed the decision to Superior Court, where she moved for a judgment on the pleadings.

Reasonably enforceable

Quinlan noted that the MassHealth regulations define a "disqualifying transfer" as "any action taken to avoid receiving a resource to which the nursing-facility resident or spouse would [otherwise] be entitled."

In *O'Brien*, Quinlan observed, the hearing officer concluded that because the creation of the trust and annuity and application for benefits occurred in such quick succession, Leo O'Brien obviously was just trying to preserve assets for his children while obtaining Medicaid eligibility for his wife.

Accordingly, there was no reason to believe O'Brien would actually enforce the annuity once his wife received her benefits, since the family's goal would then be achieved, the hearing officer decided.

But the judge rejected that reasoning, stating that the hearing officer ignored the express terms of the annuity contract itself, particularly the provisions laying out penalties in case of a default and allowing for costs and attorneys' fees in case of a dispute.

The contract was both legally and reasonably enforceable by its own express terms, Quinlan said. To disregard those terms would render any transaction between family members — or any private annuity — a disqualifying transfer regardless of its compliance with regulations.

"That is an error of law and arbitrary and capricious and not supported by substantial evidence," the judge said.

Quinlan also rejected MassHealth's assertion that the transaction to fund the annuity was not for fair market value because there was no evidence of an available market for the transferred assets.

"The regulations do not require that there be an open market for a private annuity," the judge said. "That the [a]nnuity here is meaningful only to members of the plaintiff's family, would not be [of] interest to an entity that handles commercial annuities, and likely does not mean that it has [no] value."

Accordingly, Quinlan concluded, though the agency's decision was "grounded in an area well within its expertise ... it was also based on errors of law [that were] arbitrary and capricious" and must be reversed.

For more information about the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

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CASE: *O'Brien v. Division of Medical Assistance Office of Medicaid*, Lawyers Weekly No. 12-125-11

COURT: Superior Court

ISSUE: Did a husband's creation of a private annuity constitute a transfer of assets that would disqualify his wife from receiving Medicaid disability benefits?

DECISION: No, because the annuity contract between the husband and his daughters as trustees was legally and reasonably enforceable for fair market value and not otherwise in violation of any MassHealth regulations

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