

**MEDICAID CHANGES AND CHALLENGES
AFTER THE DEFICIT REDUCTION ACT OF 2005
Oregon State Bar CLE Seminar: The Elder Law Experience**

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Note: The exhibits referenced in the outline have not been reproduced.

I. REQUIREMENTS FOR ANNUITIES

A. Pre-DRA Law and Rules

1. Prior to the adoption of the Deficit Reduction Act of 2005 ("DRA"), the purchase of an annuity by the Medicaid applicant/recipient or the community spouse was treated as a disqualifying transfer if the annuity was not scheduled to pay out fully within the actuarial life expectancy of the annuitant. The disqualification period was calculated based on the value of the payments that would be beyond the actuarial life expectancy of the annuitant. OAR 461-140-0296(6).

2. Although annuities were included in expanded definition of estate for estate recovery purposes (*see* OAR 461-135-0832), there were no specific requirements regarding beneficiary designations.

B. Post-DRA Law and Rules

1. Section 6012 of the DRA added complex requirements that must be met in order for an annuity to be excluded as a resource for Medicaid eligibility purposes and in order to avoid having the purchase of an annuity be treated as a disqualifying transfer of assets. The requirements apply to annuities purchased by Medicaid applicants/recipients who are getting long term care services and to annuities purchased by community spouses.

2. Oregon has amended several administrative rules and created a new rule for annuities in the OSIPM program, OAR 461-145-0022 (Exhibit A), to implement the DRA requirements. A few of the rules have been amended more than once following the passage of the DRA. The following discussion includes some administrative rule changes that were proposed in July 2006 and scheduled to be effective October 1, 2006.

PRACTICE TIP: The searchable online unofficial version of OAR Chapter 461 maintained by the Oregon Department of Human Services ("DHS") for what the agency terms the "Self-Sufficiency Administrative Rules," www.dhs.state.or.us/policy/selfsufficiency, is a useful resource for current Medicaid eligibility rules. The program acronym "OSIPM" used in the rules includes people who are over age 65 or who are disabled and who are applying for or receiving Medicaid assistance to help pay for long term care costs.

C. **Date of Purchase.** Determining the effective dates for some of the DRA changes can be problematic. DHS dealt with the issue in OAR 461-145-0022 by creating three different sets of requirements based on the date when the annuity was purchased:

1. Annuities purchased by the Medicaid applicant/recipient or the community spouse prior to January 1, 2006;
2. Annuities purchased by the Medicaid applicant/recipient or the community spouse between January 1, 2006, and June 30, 2006; and
- c. Annuities purchased by the Medicaid applicant/recipient or the community spouse on or after July 1, 2006.

PRACTICE TIPS: DHS created a flow chart for Medicaid workers on the post-DRA treatment of annuities as a guide to this complicated area. The flow chart is reproduced as Exhibit B. According to guidance issued by CMS, making certain changes to a previously purchased annuity may make it subject to the provisions of the DRA.

D. **The DRA Changes Do Not Affect Retirement Annuities**

1. Section 6012(c) of the DRA exempts an annuity that is part of a retirement account or plan that qualifies under Section 408 or 408A of the Internal Revenue Code, or that was purchased with the proceeds from such a retirement account or plan, from the new transfer of asset provisions. 42 USC §1396p(c)(1)(G)(i).

2. OAR 461-145-0022(1)(a) summarizes this exemption, but the list of exempt retirement accounts and plans is in OAR 461-145-0380(1)(c) (*see* Exhibit C):

- a. Individual Retirement Annuity;
- b. Individual Retirement Account;
- c. Simplified Employee Pension (SEP);
- d. Simple Retirement Account; and
- e. Certain other employment-related retirement accounts.

3. A retirement account or plan is counted as a resource if funds can be withdrawn before retirement. The value is the equity value of the account or plan, minus any penalty for early withdrawal. OAR 461-145-0380(3)(a).

E. **Concepts That Apply to All Annuities, Regardless of Purchase Date**

1. The Medicaid applicant/recipient and the community spouse must disclose any interest in an annuity as part of the application or recertification process. 42 USC §1396p(e)(1); OAR 461-145-0022(3).

2. The equity value of an annuity that is not annuitized is counted as a resource. OAR

461-145-0022(2).

3. Payments from an annuity that is excluded as a resource are counted as unearned income to the annuitant. *See* OAR 461-145-0022(9) and (10).

F. Annuities Purchased Before January 1, 2006

1. The post-DRA standards will not be applied to annuities purchased before January 1, 2006, for the purpose of determining whether there has been a disqualifying transfer. OAR 461-140-0220(8).

2. An annuity that will make payments beyond the actuarial life expectancy of the annuitant will continue to be treated as a transfer for less than fair market value. The disqualification period will be calculated based on the value of the annuity payments that will be made beyond the actuarial life expectancy of the annuitant. OAR 461-140-0296(6).

PRACTICE TIP: The administrative rules refer to the life expectancy table that appears in section 3258.9(B) of the federal CMS State Medicaid Manual. The table can be downloaded from www.cms.hhs.gov/Manuals. Choose "Paper-Based Manuals," then select number 45, State Medicaid Manual, and click on Chapter 3 - Eligibility. View the segment of the downloaded material that includes section 3258.9(B). The table is also available in section E.1 of the state's online SPD Worker Guide, www.dhs.state.or.us/spd/tools/additional. However, those tables may be out of date. CMS SMDL #06-018, dated July 27, 2006, refers to more current actuarial tables published by the Office of the Chief Actuary of the Social Security Administration at www.ssa.gov/OACT/STATS/table4c6.html.

G. Requirements for Annuities Purchased Between January 1, 2006, and June 30, 2006.

These requirements apply to annuities purchased between January 1, 2006, and June 30, 2006, if the Medicaid applicant/recipient is in a "nonstandard living arrangement" as defined in OAR 461-110-0110(13). Anyone who is applying for assistance for long term care services, regardless of whether the person is a resident of a nursing facility, an adult foster home, an assisted living facility, or a residential care facility, or is receiving in-home services is in a "nonstandard living arrangement." OAR 461-145-0022(7). The requirements apply to all annuities purchased on or after January 1, 2006, if the Medicaid applicant/recipient is not applying for assistance for long term care services.

1. The annuity must be irrevocable.

2. The annuity must pay out in equal monthly installments within the annuitant's actuarial life expectancy according to the tables used by CMS.

3. The annuity must be issued by a business licensed and approved to issue commercial annuities in the state in which the annuity was purchased.

4. The annuity must name the remainder beneficiaries in OAR 461-145-0022(8).

a. An unmarried Medicaid applicant/recipient must name DHS as the first remainder beneficiary, up to the amount of Medicaid benefits provided to the annuitant. However, a Medicaid applicant/recipient who has a child under age 21 or a child who meets the Social Security Administration criteria for blindness or disability may name the child as the first remainder beneficiary and DHS as the second remainder beneficiary.

b. A community spouse must name the Medicaid applicant/recipient as the first remainder beneficiary and DHS as the second remainder beneficiary up to the amount of Medicaid benefits provided to the Medicaid applicant/recipient. However, a community spouse who has a child under age 21 or a child who meets the Social Security Administration criteria for blindness or disability may name the child as the first remainder beneficiary and the Medicaid applicant/recipient as the second remainder beneficiary.

H. Requirements for Annuities Purchased On or After July 1, 2006 (Nonstandard Living Arrangement Only)

1. The annuity must meet the requirements in I G, *supra*, except as described below.

2. The annuity must be nonassignable as well as irrevocable.

3. The annuity must name the remainder beneficiaries in OAR 461-145-0022(10).

a. The Medicaid applicant/recipient can name DHS, the community spouse, a child under age 21, or a child who meets the Social Security Administration criteria for blindness or disability as the first remainder beneficiary. If DHS is not the first remainder beneficiary, DHS must be named as the second remainder beneficiary with the right to receive the amount of Medicaid benefits provided to the Medicaid recipient if the community spouse or child transfers any of the annuity for less than fair market value.

b. The community spouse can name DHS, a child under age 21, or a child who meets the Social Security Administration criteria for blindness or disability as the first remainder beneficiary. If DHS is not the first remainder beneficiary, DHS must be named as the second remainder beneficiary with the right to receive the amount of Medicaid benefits provided to the Medicaid recipient if the child transfers any of the annuity for less than fair market value.

c. The rule does not permit the community spouse to name the Medicaid recipient as a remainder beneficiary.

PRACTICE TIP: Clients should be told that the application form (SPD 539A) now includes a statement to be signed by the Medicaid applicant/recipient and the community spouse agreeing that DHS will be a preferred remainder beneficiary on any annuities. Each year, Medicaid workers will send out forms to the companies that issued the annuities informing them of DHS' position as a remainder beneficiary.

I. Annuities That Do Not Meet the Applicable Requirements

1. An annuity that does not meet all of the requirements (including the permissible beneficiary designations) will be counted as a resource. The value of the annuity will be determined in accordance with OAR 461-145-0022(9) and (12):

	Amount of money used to establish the annuity
+	Any additional payments used to fund the annuity
+	Any earnings
-	Any regular monthly payments already received
-	Any early withdrawals
-	Any surrender fees
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	Cash value of annuity to be counted as resource

2. OAR 461-145-0022(11) and (12) state that a non-conforming annuity purchased on or after July 1, 2006, will be counted as a resource and treated as a disqualifying transfer. As a practical matter, most of the situations involving the inadvertent purchase of a non-conforming annuity are likely to be resolved by having the Medicaid applicant/recipient or the community spouse make the annuity conform to the DRA requirements or by DHS counting the non-conforming annuity as a resource and requiring it to be spent down or included in the community spouse resource allowance as a condition of eligibility. The disqualification will end if the transfer that caused the disqualification is rescinded. OAR 461-140-0300(2).

3. If the only requirement that is not met is that the annuity pays beyond the actuarial life expectancy of the annuitant, the disqualification period will be calculated based on the value of the payments beyond the actuarial life expectancy of the annuitant. OAR 461-140-0296(5)-(6).

II. HARDSHIP WAIVERS

A. Pre-DRA Law and Rules

1. Prior to the DRA, the federal statute gave states the flexibility to waive the penalty period for an asset transfer if the denial of Medicaid eligibility would result in undue hardship.

2. The previous Oregon administrative rule authorized DHS to waive the penalty period if there would be "extreme hardship." "Extreme hardship" was not defined.

B. Post-DRA Law and Rules

1. DRA Section 6011(d) added the standards for determining undue hardship that had been in §3258.10(C)(5) of CMS' State Medicaid Manual to 42 USC §1396p(c)(2)(D).

2. OAR 461-140-0300(3) (Exhibit D) states that undue hardship exists when applying the transfer of assets penalty would deprive the Medicaid applicant/recipient of basics such as

medical care, food, clothing, shelter, or other necessities without which the applicant/recipient's health or life would be in danger. The Medicaid applicant/recipient has the burden of proving that the disqualification would create an undue hardship.

PRACTICE TIP: One example of a hardship situation given to SPD staff in a recent training was an eviction or the threat of an eviction for non-payment by a care facility.

3. The rule requires the applicant/recipient to pursue all reasonable means to recover the assets and to cooperate with DHS on actions to recover the assets.

C. Hardship Waiver Process

1. The Medicaid applicant/recipient can request an administrative hearing on the disqualifying transfer issue and apply for a hardship waiver at the same time. The Notice of Disqualification for Transfer of Assets (SDS 0540T) refers to the opportunity to request a waiver, and the Hardship Waiver Application form (SDS 0544) is supposed to accompany the notice. OAR 461-175-0310(3)(b). The DHS' Seniors and People with Disabilities (SPD) has 45 days after the application for a hardship waiver is received to make a decision.

2. The care facility in which the Medicaid applicant/recipient resides is specifically authorized to apply for a hardship waiver on behalf of the applicant/recipient.

III. LIFE ESTATE PURCHASES AS TRANSFERS

A. Pre-DRA Law and Rules. Before Congress passed the DRA, buying a life estate was treated like any other purchase. There was no disqualifying transfer of assets unless the purchaser paid more than the fair market value of the life estate.

B. Post-DRA Law and Rules

1. Section 6016(d) of the DRA amended 42 USC §1396p(c)(1)(J) to make the purchase of a life estate in someone else's home a disqualifying transfer of assets unless the buyer resides in the home for at least one year following the purchase, regardless of the amount paid for the life estate. The federal statute is silent on the issue of whether the one year residency period must consist of 365 consecutive days.

2. OAR 461-145-0310(3)(b) states that the purchase of a life estate in a home owned by another individual on or after July 1, 2006, is a disqualifying transfer of assets unless the Medicaid applicant/recipient resides in the home for at least 12 consecutive months after the date of the purchase. *See Exhibit E.*

3. The penalty is calculated using the full amount of the purchase price for the life estate.

4. There would be also be a disqualifying transfer if the Medicaid applicant/recipient

paid more than the fair market value of the life estate.

PRACTICE TIP: Although neither the DRA nor the Oregon administrative rule address how the life estate should be valued, CMS' SMDL #06-018 dated July 27, 2006, advises states to continue to follow the instructions at Section 3258.9 of the CMS State Medicaid Manual to use the life estate and remainder interest table published by the Social Security Administration for the Supplemental (SSI) program in the Program Operations Manual System (POMS) at Section SI 01140.120. The life estate and remainder interest table was adopted in Oregon as OAR 461-135-0845.

C. No Changes for Transfers with Retained Life Estates

1. The DRA did not change the transfer of asset provisions for someone who transfers real property and retains a life estate. The value of the remainder interest (calculated using the table in OAR 461-135-0845) would be used to determine whether there has been a disqualifying transfer of assets and if so, the period of ineligibility.

2. The same table is used to determine the portion of the value of the property subject to DHS' claim for the recovery of Medicaid assistance following the death of the holder of the life estate. *See State v. Willingham, 2006 Or App (2006-237).*

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