

OAST & HOOK

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Member, National Academy
of Elder Law Attorneys

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ANNUITIES AND LONG-TERM CARE PLANNING

A recent Pennsylvania Commonwealth Court case provides some insight on the use of annuities in long-term care planning. In *Ross and Ross v. Department of Public Welfare* (No. 137 C.D. 2007), the wife entered a nursing home on February 5, 2003. On April 8, 2005, her husband transferred \$418,026.66 into a single premium immediate annuity. The annuity contract pays the husband \$10,211.83 per month from May 15, 2005 to September 15, 2008. The husband established the annuity in order to qualify his wife for Medicaid Assistance-Nursing Home Care (MA-NHC) benefits (equivalent to Virginia Medicaid) and to pass assets to his children. The husband is the sole owner of the annuity, and his three children are the sole beneficiaries. The wife has no interest in the annuity, and, after the annuity purchase, she had no funds to pay the nursing home. The payment for the annuity is irrevocable, and the husband cannot terminate the annuity, but he can change the beneficiaries or sell his right to the income stream.

The husband filed an MA-NHC application, and the county assistance office determined that the annuity was an available resource with a value of \$202,364.00. The husband filed an appeal on behalf of his wife, and the Administrative Law Judge (ALJ) denied the appeal. The ALJ determined that: (1) the language of the annuity did not interfere with the husband's ability to sell his right to the income stream, thereby converting the annuity into immediate cash; (2) the present value of the income stream exceeds the resource limit; and (3) the annuity was purchased not only for the benefit of the husband and wife, but also as a way to pass assets to the children and qualify the wife for MA-NHC benefits. On further appeal, the Department of Public Welfare (DPW) affirmed the ALJ's decision. The husband and wife petitioned the court for review, claiming that the DPW erred in concluding that the income stream from the annuity is an available resource for the wife's eligibility for MA-NHC benefits. The court agreed and reversed the DPW order.

The court stated that under 42 U.S.C. §1396r-5, income and resources are treated differently, and that “no income of the community spouse shall be deemed available to the institutionalized spouse.” Therefore, “[t]he community spouse’s income does not affect the determination [of] whether the institutionalized spouse qualifies for Medicaid.” The court said that if the payment of income is made solely in the name of the community spouse, the income is income only to that spouse. In this case, the payment of the income from the annuity is made solely in the husband’s name, the income is considered income only to the husband, and none of the income is deemed available to the wife. The DPW treated the husband’s income as an available resource, but the court cited an opinion by the Superior Court of New Jersey for the proposition that “treating the market value of an income stream paid to a community spouse ‘blurs the distinction between resource allocation and income allocation’ under the federal law.” The court concluded that DPW “improperly considered [the husband’s] income stream from an irrevocable and non-assignable annuity as an available resource based on the existence of a secondary market for such income streams.”

Although this case is not precedential in Virginia, it does provide valuable information for the treatment of annuities when applying for Medicaid. Persons contemplating the purchase of an annuity should consult with an elder law attorney before the purchase to ensure that the annuity complies with the requirements of the Virginia Medicaid Manual.

The attorneys at Oast & Hook can assist clients and their families with their long-term care, estate, insurance, and financial planning needs.

Announcements

Oast & Hook is sponsoring an advocacy networking breakfast meeting. This breakfast meeting is designed for professionals and volunteers who work closely with families that have members with disabilities. It will be held on December 10, 2007, and is entitled: “Planning for Families of Persons with Disabilities.” This informative meeting will address issues facing your patients, clients or family members, and it will provide an opportunity to network with other professionals and volunteers. If you are interested in attending this breakfast meeting, then please complete and fax the attached registration form to 757-397-1267 by Wednesday, December 5th. For more information about this breakfast meeting, please phone Jennifer Lantz at 757-967-9724.

The Special Needs Alliance has begun publication of an informative e-newsletter called *The Voice*. The purpose of this newsletter is to provide information and answers about special needs planning for family members and professionals. To view this week’s edition, please visit the Special Needs Alliance website at www.specialneedsalliance.com/Voice/voice_vol1_No6a.htm. To subscribe to *The Voice* go to www.specialneedsalliance.com/subscribe.aspx.

Speakers

If you are interested in having an elder law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

Oast & Hook

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at www.oasthook.com.

Oast & Hook is a Virginia member of the Special Needs Alliance, a nationwide network of disability attorneys. As members of this alliance, we assist personal injury attorneys in resolving their cases to enhance the judgments and awards of their disabled clients and to maintain the eligibility of these clients for SSI and Medicaid. We are experienced in protecting the public benefits of persons with special needs and in assisting with the management of their assets. For more information about the Special Needs Alliance, visit its website at www.specialneedsalliance.com.

Distribution of This Newsletter

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Elder Law News*, then please e-mail us at eln@oasthook.com, telephone us at 757-399-7506, or fax us at 757-397-1267.

Please visit us on the world wide web at:

www.oasthook.com

Our website contains information about Oast & Hook and an archive of our newsletters and other estate planning, estate administration, and elder law articles in searchable form at.

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OAST & HOOK

Presents:

Planning for Families of Persons with Disabilities

Date: Monday, December 10, 2007

Location: Hilton Norfolk Airport
1566 North Military Highway
Norfolk, Virginia

Schedule: Registration: 7:30 a.m. to 8:00 a.m.
Breakfast Workshop: 8:00 a.m. to 9:00 a.m.

Presenters: Sandra L. Smith, Certified Elder Law Attorney

Tuition: This is a free breakfast meeting; advance registrations are required. Space is limited, so please register as soon as possible. Walk-in registrations will not be accepted.

Registration Form

Please complete this form and either fax it to Oast & Hook at 757-397-1267 or mail it to Jennifer Lantz at Oast & Hook, P.C., at 295 Bendix Road, Suite 170, Virginia Beach, Virginia 23452-1294.

Name: _____

Advocacy Group: _____

Address: _____

Telephone: _____ Email: _____

_____ I will be attending.

_____ I cannot attend but would like to attend future meetings. I am interested in the following topics _____.

My recommendation for future seminar days and times are: (please circle)

Monday Tuesday Wednesday Thursday Friday Weekend

Morning Afternoon Evening

_____ I am interested in having Oast & Hook give a presentation to our Advocacy Group.

For more information, please telephone Jennifer Lantz at 757-967-9724.