

2011 SENATE HUMAN SERVICES

SB 2072

2011 SENATE STANDING COMMITTEE MINUTES

Senate Human Services Committee
Red River Room, State Capitol

SB 2072
1-12-2011
Job Number 12835

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the treatment of transfers involving annuities for purposes of determining eligibility for medical assistance.

Minutes:

Attached testimony.

Senator Judy Lee, Chairman, opened the hearing on SB 2072.

Julie Leer, attorney with the Dept. of Human Services, testified in support of SB 2072.
Attachment #1

A short discussion followed that this would not be retroactive.

Senator Gerald Uglem asked if divorce can be used to protect assets.

Ms. Leer replied that people have tried. What is looked at in those cases is whether the divorce settlement is equitable.

Senator Dick Dever asked whether an illegal transaction can be reversed.

Ms. Leer said it is more difficult with irrevocable annuities. She asked Curtis Volesky to elaborate for the committee.

Curtis Volesky, Director of the Medicaid Eligibility Unit, offered information that some people try to sell the right to receive the payments to that annuity. Basically the value is what they can sell it for. Unfortunately, they might have paid a lot of money for this annuity and when they try to sell it they get much less of a return. If they are within the asset limits, they can become eligible or they could further spend it down to become eligible.

The five year look back was discussed. It may apply depending on when they set up the annuity. They look back five years from the point that someone has applied for Medicaid and needs nursing care services.

Distribution of assets was discussed. Unless there is a pre-nuptial agreement then it would be 50-50.

Senator Spencer Berry asked if anyone needing long term assistance that goes to a nursing facility would be turned down from Medicaid.

Mr. Volesky said they apply certain resource tests and the person needs to be screened as needing that level of care.

More discussion followed on whether a person who meets the requirements and needs care can be turned down for any reason. There are two requirements for ND residents – assets and meeting the criteria for admission.

Senator Gerald Uglem asked when land comes into play.

Mr. Volesky said it counts when it's just land they own and they are not living on it.

There was no opposing or neutral testimony.

The hearing on SB 2072 was closed.

Senator Gerald Uglem moved to amend to put on an emergency clause.

Seconded by **Senator Dick Dever**.

Roll call vote 5-0-0. **Amendment adopted.**

Senator Gerald Uglem moved a **Do Pass as Amended**.

Seconded by **Senator Dick Dever**.

Roll call vote 5-0-0. **Motion carried.**

Carrier is **Senator Dick Dever**.

FISCAL NOTE
 Requested by Legislative Council
 03/30/2011

Amendment to: SB 2072

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.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 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.*

2009-2011 Biennium			2011-2013 Biennium			2013-2015 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).*

This Bill sets limits on the amount of an annuity which would be unavailable for the care of a spouse receiving LTC services. The amendment makes ND Law consistent with guidance from CMS that such annuity transfers are not considered disqualifying transfers for determining Medicaid eligibility.

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.*

There would be no negative fiscal impact to the Department.

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:	Dept. of Human Services
Phone Number:	328-3695	Date Prepared:	03/30/2011

January 13, 2011



Handwritten signature and date: 1-13-11

PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 1, line 3, after "assistance" insert "; and to declare an emergency"

Page 3, after line 5, insert:

"SECTION 2. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Date: 1-12-2011

Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2072

Senate HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number Emergency Clause

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider

Motion Made By Sen. Uglem Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. Judy Lee, Chairman	✓		Sen. Tim Mathern	✓	
Sen. Gerald Uglem, V. Chair	✓				
Sen. Dick Dever	✓				
Sen. Spencer Berry	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment _____

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

Date: 1-12-2011

Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2072

Senate HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Sen. Uglem Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. Judy Lee, Chairman	✓		Sen. Tim Mathern	✓	
Sen. Gerald Uglem, V. Chair	✓				
Sen. Dick Dever	✓				
Sen. Spencer Berry	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment Sen. Dever

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

REPORT OF STANDING COMMITTEE

SB 2072: Human Services Committee (Sen. J. Lee, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2072 was placed on the Sixth order on the calendar.

Page 1, line 3, after "assistance" insert "; and to declare an emergency"

Page 3, after line 5, insert:

"SECTION 2. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

2011 HOUSE HUMAN SERVICES

SB 2072

2011 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee
Fort Union Room, State Capitol

SB 2072
March 7, 2011
Job #15004

Conference Committee

Committee Clerk Signature *Vicky Crabtree*

Explanation or reason for introduction of bill/resolution:

Treatment of transfers involving annuities regarding determining eligibility for medical assistance and declare an emergency.

Minutes:

See attached Testimony #1

Chairman Weisz: Called the hearing to order on SB 2072.

Julie Leer: Attorney with DHS introduced the bill. (See attached Testimony #1.)

Rep. Porter: In the establishment of the share is it gross or net?

Julie: Refer to Curtis Volesky.

Curtis Volesky: Director of Medicaid Eligibility for the DHS. We look at the equity value people have. If they have a lien against their property and we do the asset assessment we only look at what is free and clear.

Rep. Porter: You are looking at net not gross.

Curtis: Correct.

Rep. Porter: So the example that Ms. Leer gave us of the \$500,000 liquid assets that would be \$500,000 after you subtracted the payment of debts that was owed.

Curtis: It is a little bit different with liquid assets because if they have \$500,000 in the bank, we would look at the entire \$500,000. We would not look at if they still had a mortgage on the farm. We would not count the farm at all.

Rep. Porter: So if they had \$500,000 in liquid assets and they had a house worth \$200,000, but owed a \$100,000 on it, then the house isn't considered for anything. The spouse retains that and the department never has a stake in that house?

Curtis: If the house is the home that the committed spouse is living in, that is correct. If it was a house no one was living in, then we would look at the equity value in that house and add that to the assets.

Rep. Porter: Is the house ever looked at? Say the spouse never ends up on Medicaid and the other spouse is on Medicaid and she sells the house. Once you do your initial assessment and initial split, then it is never looked at again.

Curtis: The asset assessment is done at the point that someone needs nursing care and so it really is a snapshot of their assets at that point and time. If the husband was in the nursing home and the spouse decided to sell the house at a later date then we don't look at that house. In the end through a state recovery process if the house is part of the estate it could come into play at that point.

NO OPPOSITION

Chairman Weisz: Closed the hearing on SB 2072.

2011 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee
Fort Union Room, State Capitol

SB 2072
March 7, 2011
Job #15038

Conference Committee

Committee Clerk Signature

Vicky Crabtree

Minutes:

Chairman Weisz: 2072 committee. If you recall in the testimony there is a suggested amendment for the bill having to do with revocable annuities and not (inaudible) disqualifying transfers. If they are done after February 2006.

Rep. Porter: Our concern in the past has always been making sure that we are not stricter than what the federal requirements are and that we are matched up to those requirements and don't exceed them. I think in the past, we found ourselves exceeding them at times and we've tried over the past few sessions to straighten that out and make sure that we do not exceed the federal requirements. I don't think anyone intended to loosen it up to the point of the example they gave. I think the state can get short changed in that possible transfer of assets and in that language. I think the bill brings us into line with the federal statutes.

Chairman Weisz: Currently, they could sell a lot of annuity. Look at how much money you could shift.

Rep. Devlin: I would move the amendment.

Rep. Kilichowski: Second.

Rep. Paur: The amendment says, emergency, (someone talks to him and is inaudible) ok thank you.

Rep. Hofstad: Is the date the look back, is that why we (interrupted by Chairman)

Chairman Weisz: I assume so. I assume it is the 5 year look back.

Rep. Holman: If that is a look back, is the look back a moving target or not?

Chairman Weisz: The look back is 5 years.

Rep. Holman: Putting a specific date in does that alter that?

Chairman Weisz: No. This is just clarifying on the annuities that are revocable and not disqualifying so anything prior to that date is not disqualifying anyway. I'm not sure why February 8. I can't give you an answer to that one.

VOICE VOTE: MOTION CARRIED

Rep. Damschen: I move a Do Pass as amended.

Rep. Anderson: Second.

Rep. Conklin: Are we leaving the spouse whoever is getting the annuity enough money to survive on?

Chairman Weisz: I don't think that should be an issue because the community spouse is already allowed \$3,000 and some income.

Rep. Conklin: But, if she cannot get that without having some of her spouse's share of their assets. We are taking that money away from her.

Chairman Weisz: That is true if the amount is limited and they have the \$109,000 exemption up front and then the \$3,000 which is minimal on the assets. You need to point out for example that is a farm, then that doesn't count.

Rep. Conklin: But, if you just leave it out as a straight person who doesn't have a farm or anything and they have \$200,000 in assets and can only put a \$100,000 into the annuity for the spouse, that person is going to have a hard time surviving on that. Where if they could put the whole \$200,000 it would be better. Am I reading this wrong?

Chairman Weisz: No you are not. Obviously if they can put the whole works in for the community spouse that would increase (interrupted by Rep. Conklin).

Rep. Conklin: So we are paying off the Medicaid bill, but we are putting him on welfare someplace else is what is basically going to happen.

Chairman Weisz: Ok if we used your case you would take the \$200,000 and would deduct a \$109,000 out of that first and then another \$6,000 for each spouse. You would have left about \$85,000. Then that would have to be split between the two under this bill. The community spouse would get the \$109,000 plus the \$3,000 plus roughly \$42,000 in your example that they could put into an annuity instead of roughly \$85,000.

Rep. Conklin: Which is pretty hard to live on.

Chairman Weisz: If you have a half million dollars and then the community spouse could take a \$387,000 annuity plus (stops).

Rep. Conklin: That is the problem is maybe the limits on it where (stops).

Chairman Weisz: You are right it doesn't lower the maximum amount that they can have for income, but it lowers their source that might be available. That is correct.

Rep. Porter: I don't know if it does.

Chairman Weisz: If they have no other source to get to that. What are they allowed? \$3200 a month? It doesn't say that in here does it.

Rep. Porter: No. This is just for the determination of (interrupted by the Chairman).

Chairman Weisz: Right, but the community spouse is limited to the amount of income the community spouse can receive. That wouldn't then have to apply to the spouse that is in the home. I believe it is around \$3200-3300 a month. If they have income sources over and above that, that income can be used to pay for the care. That is currently. Let's say the community spouse is getting \$1200 a month in social security and \$800 a month rent from something. So they have around \$2,000 month and they could now have an annuity that would give her \$1200 a month. They are earning the maximum allowed and it doesn't affect the other spouse's eligibility for Medicaid. That is the main point of an annuity.

Rep. Damschen: (Didn't have microphone on, inaudible).

Chairman Weisz: It kind of has two affects. It is not really for a determination for eligibility necessarily. It just says that they have to spend down. If they have \$500,000 under the current the bill, they will split the \$250,000 and he who is applying for assistance will have to spend down that \$250,000 asset first before he is eligible. She can put the other \$250,000 in an annuity to protect that. The income from the annuity is also protected as long as the total income she is receiving doesn't exceed that I think is around \$3200 a month. That is the only place where the income comes in.

Rep. Conklin: What kind of money would an annuity generate?

Rep. Porter: The example that the department gives on page 3 is really what the difference is. Under this proposal that \$500,000 the community spouse would be able to keep in an annuity a \$109,560 and \$3,000. The remaining \$247,000 would be available to pay for the spouse's care. Under the current law she would be able to put the \$387,000 into an annuity and the spouse immediately be available for Medicaid without any spend down.

Chairman Weisz: Even under current scenario, he is eligible immediately, but now let's say they both die in a short period of time and the department could still go against estate to get payment back even though she protected it from being spent up front. It is still available to Medicaid to recoup their costs. It doesn't eliminate a liability, but it protects it again so he or she can earn a greater income up front.

Rep. Conklin: I understand that, I'm just worried that (interrupted by the Chairman).

Chairman Weisz: The income is really the point of the annuity. Your concern is (stops).

Rep. Conklin: We are going to make the spouse broke that is out there.

Chairman Weisz: You have a good point. We did pass legislation in '07 or '09 that I thought made it easier for the department to get that annuity also.

Rep. Paur: Community spouse resource allowance in the Century Code references the social security act.

Chairman Weisz: That is the \$3200 a month I'm talking about. We can sit on this if you want a little more (stops).

Rep. Porter: It may not hurt to look into it a little further and make sure we aren't going backwards from what we have done in the past couple of sessions. The one thing I think we are clear on is that even if the couples are able to retain the additional income and the institutionalized spouse is going on Medicaid sooner, in the end out of that annuity when that other surviving community spouse would pass away, the department has first claim to have their money back. What Rep. Conklin is talking about it true, that the state is not out anything, it is just a manner of when the state gets their money. Do we take income away from the community spouse up front or wait and get it when the annuity is cashed in after both are deceased?

Chairman Weisz: The state pays up front and gets it on the tail end.

Rep. Porter: I agree it needed to be amended. Now that it is amended, I'm not necessarily sure that needs to pass.

Chairman Weisz: Rep. Conklin raised a good point and we should sit on this.

Rep. Damschen: I think by putting both amounts in the annuity then they are starting right away with Medicaid services.

Chairman Weisz: That is true, but again in the end the total costs of the state won't change.

Rep. Porter: (Spoke without mic on and inaudible)

Chairman Weisz: Actually I was surprised he wasn't here on this. We will dig into this a little more.

Rep. Damschen: I will withdraw my motion of a Do Pass as amended.

Rep. Anderson: I withdraw my second.

Chairman Weisz: We are adjourned until tomorrow morning.

2011 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee
Fort Union Room, State Capitol

SB 2072
March 16, 2011
Job #15511

Conference Committee

Committee Clerk Signature <i>Vicky Crabtree</i>

Minutes:

Chairman Weisz: The annuity bill. I had a nice visit with Greg Larson the annuity specialist here in Bismarck. He apologized as this missed their radar completely otherwise he would have been here against this bill. He says it is in direct conflict with federal law. That may be debated. There have been court cases that rule you cannot limit the annuity amount. He agrees with Rep. Conklin's assessment that you will have many cases in the lower assets levels where they wouldn't be able to bump their income enough to even matter as far as the community spouse. All annuities make the department as the payable. The annuity belongs to the department when the spouse dies.

Rep. Porter: I move a Do Not Pass as amended.

Rep. Louser: Second.

Rep. Damschen: It only goes to the department if they have it coming.

Chairman Weisz: Because the annuity is for Medicaid purposes, the department is listed on the annuity up front. That money isn't being spent down. If the spouse would die right away in the home there wouldn't be anything owed to the department then and that part would go away.

Rep. Porter: They are listed as the beneficiary. They have the first take of the amount that was expended through the Medicaid program. The balance left goes back to the estate and if there is zero balance left then it worked the way it was planned. The community spouse maintains their level of income and living and the institutionalized spouse was on Medicaid.

Chairman Weisz: Last session we passed it through the House that an annuity bill that came from the private sector addressed some of these issues. The Senate killed it because the department came into and opposed it. So this is their answer to what they didn't like that was done last session.

Rep. Damschen: I don't have a problem supporting a Do Not Pass motion. I thought we wanted it because the testimony led me to believe that some were using it as a shelter to get onto Medicaid right away.

Chairman Weisz: In a sense that is true. If the institutionalized spouse had never spent down the money to get into Medicaid and dies 4 weeks later; it doesn't matter because that annuity has the department as a beneficiary. If he spent \$5,000 - \$50,000, (as an example) they have got that \$500,000 annuity or \$387,000, but they have got that annuity and they are going to take that \$5,000 or whatever is owed to them. It is a difference of paying up front or paying later.

Rep. Porter: In Rep. Damschen's comments about a shelter; it really is a way to keep the community spouse in (chairman talking at same time) off from assistance because of the ill health of the other spouse that would require the institutional care. It falls down to a zero interest loan from the department that will be paid back and allows the community spouse to maintain their level of income to live in the community rather than having to institutionalize spouses. It has always been the attempt of the Legislature and the House for certain to try to keep as many people in the community and in the least restrictive form of care. This in my estimations would go against that.

Rep. Porter: I move a Do Not Pass as amended.

Rep. Louser: Second.

Vote: 12 y 0 n 1 absent – Rep. Kilichowski

Bill Carrier: Rep. Porter

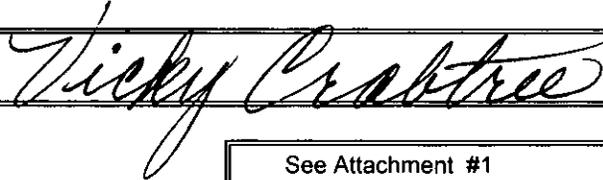
2011 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee
Fort Union Room, State Capitol

SB 2072
March 30, 2011
Job #16200

Conference Committee

Committee Clerk Signature



Minutes:

See Attachment #1

Chairman Weisz: Called the meeting to order on SB 2072. The hearing is not being reopened it is just to be a discussion on 2072 then the committee will make a decision whether to reconsider their actions. The department wanted to explain more about the bill.

Julie: From the DHS. One of the reasons for not passing the bill was the understanding the remainder of the annuity would go back to the department so we would ultimately get that principle anyway. What we wanted to clear up on that was idea that if somebody put the \$100,000 into an annuity and they and their spouse would die and we go for a state recovery, we are not going to see \$100,000 back. We are going to see the amount of the remainder that wasn't used to help supply that stream of income. Depending upon the life of the person who had the annuity in their name, it could be anywhere in between \$100,000 and zero. Another concern we understand that was raised was where a couple has a smaller estate. If you have a \$100,000 estate and the community spouse's share who is not in a nursing home is \$50,000 and the institutionalized spouse's share is \$50,000 that the community spouse would not benefit under this bill from the institutionalized spouse's share. The currently existing law is if the institutionalized spouse's share was put in an annuity, the income they receive from that annuity could be given to the community spouse. We believe that mechanism exists in the current law to allow for that. We could offer an amendment to ensure that there are two limits. Right now the way the bill reads, it would be on top of page 3, line 4 where it says, "the total of all annuities owned by the purchasers do not exceed the spousal share. We could propose an amendment that the total values of the annuity owned by the purchaser do not exceed the greater of the maximum community asset allowance or the spouse's share. We made a couple of examples. The examples show the impact of the bill on a smaller estate and a larger estate. She explained the examples. (See Attachment #1)

Chairman Weisz: With this bill the community spouse can keep \$75,000 and the institutionalized spouse can put his \$75,000 in an annuity. Why didn't that happen under your first example?

Julie: Deferred question to Curtis Volesky.

Curtis Volesky: From the DHS. Currently statute would allow that institutionalized spouse to purchase an annuity in their name, the problem with that would be that income would

belong to the institutionalized spouse. They can only give so much away to their community spouse. They would likely end up having lots of income.

Chairman Weisz: In the second example, the institutionalized spouse puts it into the annuity, but the income then is not going to the community spouse in that case either then.

Curtis: We are trying to show in the example there is with the bill it would say the community spouse can only have up to \$75,000 in the annuity. The other \$75,000 would belong to the institutionalized spouse. If that institutionalized spouse purchased an annuity for themselves and it was a qualifying annuity; they could deem any access income or any income they received from that and could deem it to the community spouse to bring the community spouse up to the allowed community spouse income level.

Chairman Weisz: Why didn't they do that in the first example?

Curtis: I think we are talking about a big difference in the dollar amount. An annuity that is as large as in the first example; that is going to produce quite a bit more income. Where the annuity in the second example which is a smaller estate is going to produce a much smaller amount of income. That income will likely be retained by the community spouse. The larger income they wouldn't be able to retain it all and would have to spend it down.

Rep. Kilichowski: Is it because the community spouse in the first one is already at the limit of \$109,000 and the second one is not at that threshold?

Curtis: The community spouse can only have a maximum of \$109,000 in cash. They still have the spouse's share which is half of the total asset and with the bill we would say they could put that much into an annuity. The annuity will provide income to them. We don't take the income that the community spouse receives and apply that to the spouse in the nursing home. They get to keep all of their own income. A person in the nursing home, if they have a big chunk of income; they can only give it to their community spouse if the community spouse doesn't have income at a certain level. That level is a little under \$2300.

Rep. Porter: When the institutionalized or community spouse would take out the annuity, the portion that would have been the institutionalized spouses share, how does the state then recover what they deem to be the necessary amount? When can the principle be touched and how is that annuity upon the death of the community spouse put back out to the estate or to the state?

Curtis: In order for the annuity to qualify it has to name the department as the beneficiary after the death of both spouses. If there is any money left in that annuity when both spouse have passed away, that money will go to the state. Depends on how long those individuals live. If the live to full life expectancy, there won't be any money left in the annuity. If they die prematurely then potentially there will be money left in there and we would be named as beneficiary on that annuity.

Rep. Porter: As the payout of that annuity as figured, it is paid out over the life span of the community spouse if that is how it is put in. That includes both interest and principle that can be paid out using that formula?

Curtis: That is correct.

Julie: The examples were not necessarily meant to be parallel. The first one was meant to address the situation that the bill is trying to address and the second one was to address more of the situation we understand was held in discussion. We were trying to show how the smaller estate could still take full advantage of the cash that they have.

Rep. Hofstad: Part of the discussion in the committee centered around the community spouse and keeping her off from Medicaid. Have you done any analysis to look at that \$691,000 regardless of what that figure is? In essence it is you pay or she pays. In the final analysis is it better or not because we are still dealing with that same pool of money or we not?

Julie: The community spouse is going to be able to retain the money we are talking about. The community spouse isn't going to have any independent responsibility for the institutionalized spouse's care as long as it is within the income limit that is set for retention of assets by the community spouse. The only time the money of the community spouse is going to be subject to any kind of evaluation by Medicaid once the determination is made for the institutionalized spouse is if the community spouse needs nursing home care. Am I missing your question?

Rep. Hofstad: No.

Chairman Weisz: The community spouse is \$3200 or \$3300 a month is the maximum they can have?

Julie: The income for the community spouse is around \$4100. That is annuity income plus other income.

Chairman Weisz: At \$691,000 and producing a 6% return so the excess income in this case say, social security and annuity is now giving more than \$5000 a month to the community spouse. What happens in that situation? What happens to the extra income of from that annuity?

Julie: Deferred question to Curtis.

Curtis: Whatever income belongs to the community spouse; there really is no limit on the amount the community spouse can have. The limits come in when setting up an annuity. There is a maximum amount of income that annuity can generate. That is around \$2739 a month. That annuity plus the other income can't exceed about the \$4100.

Chairman Weisz: As in my example, now they are exceeding the limits that was set by the annuity and total income so then what happens?

Curtis: If the annuity was exceeding the limits, then the annuity would not be exempt as an asset.

Chairman Weisz: Are you saying the whole value of the annuity is now going to be counted as an asset?

Curtis: It would be counted as an asset if the income it produces is too high.

Chairman Weisz: You are saying that they won't be able to do an annuity of that size anyway because it is going to exceed the limits of the \$2700.

Curtis: There are so many variables with annuities. Is based often on the length of time the annuity is going to pay out, the age of individual and those things. You could have somebody who is younger and lives a longer life and if they wanted to get a large amount, say \$2700 a month from an annuity, they would have to have a very large chunk of change to generate that kind of income. It depends on the age of the individual.

Rep. Porter: The \$691,000 annuity at 5% generates \$34,550 in interest and income per year. That exceeds the \$2700 a month we talked about before. The principle of that annuity could never be touched and that full principle would belong to the State of ND because of the \$2700 per month income cap. The confusing part of this with all these different rules that come into play, each time we hear something it changes. In the last five minutes I am totally confused on your math.

Chairman Weisz: That was my point.

Curtis: They would be good annuities if they paid that kind of interests. We see a lot of annuities that pay no interest or pay out the amount of principle that was put in is what it is going to pay out over the ten year period of the annuity. In order for the annuity to be exempt under the state statute it has to pay out all of the benefits within that person's life expectancy. You couldn't have an annuity that would pay out only the interest portion and never the principle in the life expectancy or else that annuity couldn't be excluded under current state statute.

Chairman Weisz: Based on what you are saying I will use an example of a twenty year life and this \$691,000. You are saying that wouldn't be a qualifying annuity because the income would far exceed the \$2739 even at a zero return.

Curtis: Correct, but they may have a life expectancy that is longer than twenty years.

Chairman Weisz: To be fair I wanted to give Greg a chance to respond and the committee can ask any questions.

Gregory Larson: I'm an attorney in Bismarck and was the original draftsman of the bill that became this statute that now is attempted to be amended. After being involved with this bill since 2003 I am totally confused by a bill that I understand completely. That is because of the explanation that has been given here. I want to commend the committee for the last bit of analysis that you went through. You are exactly right. On the first example

that was handed out, there is no way there would be an annuity purchased for \$691,000 because the payments it would generate monthly would exceed the limitations. I also read the example given in the original testimony and that example is also incorrect in the same regard. The concern that the department has and why they want to limit the statute is really of no concern because the statute itself limits itself. When the statute was originally passed in 2003 there was no limitation. Somebody could have purchased an annuity for \$691,000 and had \$10,000 a month income and that would have been fine under the statute. In 2005 we got together with the department and we limited the amount that a person could use to purchase an annuity. It was limited by the monthly income that the annuity would generate. In addition the person who is buying the annuity is limited by what other income sources they have. You had two limitations. The first one is the \$2700 a month income just from the Medicaid annuity and the second limitation is you combine all income they get and that can't exceed \$4100 a month. The amount of annuity they have here, we would never get into this. They would never be able to buy a \$691,000 annuity. In the previous example in the testimony it was like a \$400,000 annuity. The limitations already are in the statute to stop that. What the affect in the change of the law is to further provide a limitation on the amount that could be put into an annuity. And that further limitation as I read it; I disagree with the second example that it doesn't stop that smaller annuity from being purchased. When the annuity statute was originally passed it was regarding a specific client that I have. Her name was Donna Sucutte and she was from Fargo. They had \$200,000 in assets. Under the Medicaid laws at that time, \$100,000 would be exempt and the other \$100,000 she would have to spend down on care. Because the federal law allows these annuities we said we want to get a specific statute that allows her to take that other \$100,000 and buy an annuity with that and keep \$100,000 as cash. Then that provides her with a livable income. With that example the statute was passed unanimously in the House and the Senate in 2003. In 2005 we agreed to an amendment so we could limit the amount to be put into an annuity. In 2007 we added more limitations. In the 2007 limitation we named the department as the eventual beneficiary when both spouses had passed away. With that we have a fine working annuity statute that is clear and understandable. There are references in here about the institutionalized spouse buying an annuity. Never would the institutionalized spouse buy the annuity because the institutionalized spouse would then have the income from that annuity and they would have to spend it on their care. In every case I have been involved with, it has been the community spouse that buys the annuity. Yet they give examples of institutionalized spouse and it doesn't make sense then and it is unclear. The statement by Mr. Volesky regarding the payments from the annuity, that is correct. You don't look at the interest earned on the annuity. The interest varies from like .5% to 2%. The total amount of the payments, if you have a \$100,000 annuity and it was going to pay out over 100 months, you are going to get \$1,000 paid every single month until the last payment and then the annuity is gone. It is principle and interest that comes out on all of these payments. If the person who purchased the annuity had gone half way through the time period and then both spouses died, then half of that annuity would be left and available to go to the state. There is no need for this amendment to the bill. The reasons the state gives that there could be this large annuity purchased are not correct. There is already a mechanism in the statute that stops these large annuities from being purchased and it works. This bill is being proposed to further limit the amount to be used. Right now it is limited to a small amount of income they can receive that is a livable income and the statute should stay as it is.

Chairman Weisz: Question for Julie. As far as the income limitation on the community spouse, the example you used in your original testimony talked about they had a farm and is the income from that farm counted against the allowable income for a community spouse?

Julie: Yes.

Chairman Weisz: I thought the committee should hear testimony on both sides here when the issue came up. There was some misunderstanding on the asset part of the annuity as far as the department's ability to collect on it. I probably made an incorrect statement in here to, the fact that all the asset was recoverable and it isn't necessarily.

Rep. Hofstad: Reconsider the bill.

Rep. Porter: Second.

Voice Vote: Motion Carried

Rep. Porter: Listening to both sides of the argument and think we made the right decision to begin with and standby the committee's recommendation for a Do Not Pass.

Chairman Weisz: If there is not a motion then we will send it back up stairs. Thank you everyone for coming in.

March 16, 2011

VR
3/16/11

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

Page 1, line 1, after "to" insert "create and enact a new subsection to section 50-24.1-02.8 of the North Dakota Century Code, relating to the treatment of transfers involving annuities for purposes of determining eligibility for medical assistance; to"

Page 3, after line 5, insert:

"**SECTION 2.** A new subsection to section 50-24.1-02.8 is created and enacted as follows:

An annuity purchased on or after February 8, 2006, or a payment option selected or altered on or after February 8, 2006, which is revocable, or for which the annuity or annuity payments may be assigned, is not a disqualifying transfer under subsection 6."

Renumber accordingly

Date: 3-7-11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2072

House HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Devlin Seconded By Rep. Kilichowski

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ			REP. CONKLIN		
VICE-CHAIR PIETSCH			REP. HOLMAN		
REP. ANDERSON			REP. KILICHOWSKI		
REP. DAMSCHEN					
REP. DEVLIN					
REP. HOFSTAD					
REP. LOUSER					
REP. PAUR					
REP. PORTER					
REP. SCHMIDT					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Voice Vote
Motion Carried*

Date: 3-16-11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2072

House HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Porter Seconded By Rep. Louser

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ	✓		REP. CONKLIN	✓	
VICE-CHAIR PIETSCH	✓		REP. HOLMAN	✓	
REP. ANDERSON	✓		REP. KILICHOWSKI	A	
REP. DAMSCHEN	✓				
REP. DEVLIN	✓				
REP. HOFSTAD	✓				
REP. LOUSER	✓				
REP. PAUR	✓				
REP. PORTER	✓				
REP. SCHMIDT	✓				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Rep. Porter

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

Date: 3-31-11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2072

House HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider

Motion Made By Rep. Hofstad Seconded By Rep. Porter

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ			REP. CONKLIN		
VICE-CHAIR PIETSCH			REP. HOLMAN		
REP. ANDERSON			REP. KILICHOWSKI		
REP. DAMSCHEN					
REP. DEVLIN					
REP. HOFSTAD					
REP. LOUSER					
REP. PAUR					
REP. PORTER					
REP. SCHMIDT					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Voice Vote
Motion Carried*

REPORT OF STANDING COMMITTEE

SB 2072, as engrossed: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2072 was placed on the Sixth order on the calendar.

Page 1, line 1, after "to" insert "create and enact a new subsection to section 50-24.1-02.8 of the North Dakota Century Code, relating to the treatment of transfers involving annuities for purposes of determining eligibility for medical assistance; to"

Page 3, after line 5, insert:

"SECTION 2. A new subsection to section 50-24.1-02.8 is created and enacted as follows:

An annuity purchased on or after February 8, 2006, or a payment option selected or altered on or after February 8, 2006, which is revocable, or for which the annuity or annuity payments may be assigned, is not a disqualifying transfer under subsection 6."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2072, as engrossed and amended: Human Services Committee (Rep. Weisz, Chairman) recommends DO NOT PASS (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2072, as amended, was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

SB 2072

#1

Testimony
Senate Bill 2072 – Department of Human Services
Senate Human Services Committee
Senator Lee, Chairman
January 12, 2011

Chairman Lee, members of the Human Services Committee, I am Julie Leer, an attorney with the Department of Human Services. The Department is here today to support Senate Bill No. 2072.

This bill relates to requirements for annuities relative to Medicaid eligibility. Federal statute (42 U.S.C. 1396r-5) provides for an asset assessment of a couple's assets at the point one of them begins receiving long-term care to establish a share of the couple's assets for each spouse. Under federal law, the share for each spouse is equal to half of the couple's countable assets. The amount that the community spouse (the spouse not receiving long-term care) is allowed to retain is subject to certain limits. The couple's assets in excess of those limits are identified as assets that are available to meet the needs of the spouse receiving long-term care, including the payment to the facility at which the spouse is receiving care. The community spouse is also allowed to keep a higher amount of income.

Some couples choose to purchase irrevocable annuities to provide for income for the community spouse and to attempt to reduce the amount of assets that are available to be spent on the care of the spouse receiving long-term care services. Federal statutes provide that the asset values of these annuities are countable assets in determining whether the community spouse is within the allowed asset limit. This also prevents a

couple from sheltering excess assets.

Through NDCC section 50-24.1-02.8, more of a community spouse's share of the assets was protected if it was needed to increase the income of the community spouse. This was accomplished by enacting statutes to exclude as an asset, certain annuities that meet specific criteria.

During a phone call with Centers for Medicare and Medicaid Services (CMS) in the summer of 2010, CMS pointed out that North Dakota's annuity statute places no limit on how much of a couple's assets may be used to purchase the annuities described above. This creates the potential for all of the couple's assets, including the institutionalized spouse's share, to be converted into an annuity. Because these annuities are excluded assets for purposes of determining the eligibility of the spouse needing care, these couples become Medicaid eligible while retaining a potentially substantial amount of their assets in the annuity.

Medicaid has begun to receive applications from couples in which virtually all of the couple's assets are used to fund an annuity for the community spouse. The spouse receiving long-term care services becomes immediately eligible for Medicaid without spending any of the couple's assets toward the cost of care, including the amount typically identified as the share attributable to the spouse needing care. The proposed amendment is necessary to avoid a sizeable fiscal impact on the Medicaid program.

Here's an example:

A couple owns a farm on which the community spouse resides, and they have \$500,000 in liquid assets. The farm is not counted as an

available asset, so only the \$500,000 in liquid assets are considered. Each spouse's share is \$250,000. Federal statutes allow the community spouse to keep \$109,560, and the institutionalized spouse is allowed to retain \$3000 in assets. The remaining amount is available to cover the cost of care for the institutionalized spouse. State statutes allow the community spouse to purchase an annuity to guarantee more income for the community spouse. Under the current statute the community spouse could use all of the "excess" assets, \$387,440 (\$500,000 less \$109,560 and \$3,000 for each spouse), to purchase an annuity, and the institutionalized spouse would be immediately eligible for Medicaid. Under the proposed legislation, the amount the community spouse could apply toward the purchase of an annuity would be limited to the community spouse's share of the couple's assets, in this example \$250,000. The remaining \$247,000 in excess assets would be available to pay for the institutionalized spouse's care.

The potential fiscal impact if the requested amendments are not adopted depends on the number of couples who take this approach and the amount of assets they own. Because this information is not known, a fiscal impact cannot be determined at this time. An example of potential costs is found in four recent applications for couples who have used this strategy. These four couples were able to retain an additional \$267,000 in their annuities instead of paying that amount toward their care costs. If there is no change to the statute, the Department believes more couples will avail themselves of the annuity option to make them eligible for Medicaid sooner. With more than 300 of these applications on average per year, this will likely result in an increasingly large fiscal

impact.

The change in subsection 6 limits the amount of a couple's assets that can be used to fund an annuity for the community spouse. The amount that can be used is limited to one half of the couple's assets or the community spouse's share. The changes to subsection 1 are simply to define terms used to prevent ambiguity and to provide clarification.

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

#1

Testimony
Engrossed Senate Bill 2072 – Department of Human Services
House Human Services Committee
Representative Weisz, Chairman
March 7, 2011

Chairman Weisz, members of the Human Services Committee, I am Julie Leer, an attorney with the Department of Human Services. The Department is here today to support Engrossed Senate Bill No. 2072. The Department is also offering an additional amendment.

This bill relates to requirements for annuities relative to Medicaid eligibility. Federal statute (42 U.S.C. 1396r-5) provides for an asset assessment of a couple's assets at the point one of them begins receiving long-term care to establish a share of the couple's assets for each spouse. Under federal law, the share for each spouse is equal to half of the couple's countable assets. The amount that the community spouse (the spouse not receiving long-term care) is allowed to retain is subject to certain limits. The couple's assets in excess of those limits are identified as assets that are available to meet the needs of the spouse receiving long-term care, including the payment to the facility at which the spouse is receiving care. The community spouse is also allowed to keep a higher amount of income.

Some couples choose to purchase irrevocable annuities to provide for income for the community spouse and to attempt to reduce the amount of assets that are available to be spent on the care of the spouse receiving long-term care services. Federal statutes provide that the asset values of these annuities are countable assets in determining whether the community spouse is within the allowed asset limit. This also prevents a

couple from sheltering excess assets.

Through NDCC section 50-24.1-02.8, more of a community spouse's share of the assets was protected if it was needed to increase the income of the community spouse. This was accomplished by enacting statutes to exclude as an asset, certain annuities that meet specific criteria.

During a phone call with Centers for Medicare and Medicaid Services (CMS) in the summer of 2010, CMS pointed out that North Dakota's annuity statute places no limit on how much of a couple's assets may be used to purchase the annuities described above. This creates the potential for all of the couple's assets, including the institutionalized spouse's share, to be converted into an annuity. Because these annuities are excluded assets for purposes of determining the eligibility of the spouse needing care, these couples become Medicaid eligible while retaining a potentially substantial amount of their assets in the annuity.

Medicaid has begun to receive applications from couples in which virtually all of the couple's assets are used to fund an annuity for the community spouse. The spouse receiving long-term care services becomes immediately eligible for Medicaid without spending any of the couple's assets toward the cost of care, including the amount typically identified as the share attributable to the spouse needing care. The proposed amendment is necessary to avoid a sizeable fiscal impact on the Medicaid program.

Here's an example:

A couple owns a farm on which the community spouse resides, and they have \$500,000 in liquid assets. The farm is not counted as an

available asset, so only the \$500,000 in liquid assets are considered. Each spouse's share is \$250,000. Federal statutes allow the community spouse to keep \$109,560, and the institutionalized spouse is allowed to retain \$3000 in assets. The remaining amount is available to cover the cost of care for the institutionalized spouse. State statutes allow the community spouse to purchase an annuity to guarantee more income for the community spouse. Under the current statute the community spouse could use all of the "excess" assets, \$387,440 (\$500,000 less \$109,560 and \$3,000 for each spouse), to purchase an annuity, and the institutionalized spouse would be immediately eligible for Medicaid. Under the proposed legislation, the amount the community spouse could apply toward the purchase of an annuity would be limited to the community spouse's share of the couple's assets, in this example \$250,000. The remaining \$247,000 in excess assets would be available to pay for the institutionalized spouse's care.

The potential fiscal impact if the bill as it passed the Senate is not adopted depends on the number of couples who take this approach and the amount of assets they own. Because this information is not known, a fiscal impact cannot be determined at this time. An example of potential costs is found in four recent applications for couples who have used this strategy. These four couples were able to retain an additional \$267,000 in their annuities instead of paying that amount toward their care costs. If there is no change to the statute, the Department believes more couples will avail themselves of the annuity option to make them eligible for Medicaid sooner. With more than 300 of these applications on average per year, this will likely result in an increasingly large fiscal

impact.

The change in subsection 6 limits the amount of a couple's assets that can be used to fund an annuity for the community spouse. The amount that can be used is limited to one half of the couple's assets or the community spouse's share. The changes to subsection 1 are simply to define terms used to prevent ambiguity and to provide clarification.

The bill was amended in the Senate to add the emergency clause.

The additional amendment being offered today is in response to discussions between the Department, a representative of New York Life Insurance Company (New York Life), and a representative of the American Council of Life Insurers (ACLI). The representatives of New York Life and the ACLI approached the Department after the Senate Human Services Committee had acted on the bill with a concern that North Dakota state law was inconsistent with a guidance issued by CMS. After discussing this and confirming with CMS that the guidance previously issued is still valid, the Department prepared the amendment that is being offered. Consistent with the CMS guidance, the proposed amendment provides that transfers into a revocable or assignable annuity under section 50-24.1-02.8 would not be considered a disqualifying transfer.

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

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

Page 1, line 1, after "to" insert "create and enact a new subsection to section 50-24.1-02.8 of the North Dakota Century Code, relating to the treatment of transfers involving annuities for purposes of determining eligibility for medical assistance; to"

Page 3, after line 5 insert:

"SECTION 2. A new subsection to section 50-24.1-02.8 is created and enacted as follows:

An annuity purchased on or after February 8, 2006, or a payment option selected or altered on or after February 8, 2006, that is revocable, or for which the annuity or annuity payments may be assigned, is not a disqualifying transfer under subsection 6."

Re-number accordingly

#1

Examples of the impact to medicaid with and without Senate Bill No. 2072

A couple has property and cash worth a couple of million dollars. The value of the residence (\$1.5 million) is exempt. The value of cash accounts is \$800,000.

1. The Community Spouse's spousal share is \$400,000; the community spouse asset allowance under federal law is approximately \$109,000.
2. With this bill:
 - a. The community spouse may keep \$109,000 and put \$291,000 into an annuity.
 - b. The institutional spouse would have to spend down the institutionalized spouses \$400,000 share.
3. Without this bill:
 - a. The community spouse may keep \$109,000 and put \$691,000 into an annuity.
 - b. The institutional spouse would be immediately eligible for medicaid.

A couple has property and cash worth \$200,000 dollars. The value of the residence (\$50,000) is exempt. The value of cash accounts is \$150,000.

4. The Community Spouse's spousal share is \$75,000; the community spouse asset allowance under federal law is approximately \$109,000.
5. With this bill:
 - a. The community spouse may keep \$75,000 and the institutionalize spouse could put \$75,000 into an annuity.
 - b. The institutional spouse would be immediately eligible for medicaid.
6. Without this bill:
 - a. The community spouse may keep \$75,000 and put the other \$75,000 into an annuity.
 - b. The institutional spouse would be immediately eligible for medicaid.