

Avoiding Medicaid Transfer Penalties – Part I

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As readers of this column will know, Medicaid is the public benefit program that pays for long-term nursing care. But, unlike Medicare, it is not enough that you be elderly and ill in order to qualify, you also have to be impoverished – your “countable assets” need to be spent down to just a few thousand dollars.

For that reason, and in order to prevent people from immediately qualifying for Medicaid simply by transferring their assets to their children, Medicaid requires that any gifts made within 60 months (five years) prior to the date the Medicaid application is filed be disclosed. If there have been such gifts made during this five-year “look-back period,” this will create a period of time that the person applying for Medicaid cannot be eligible to receive long-term care benefits.

Note that the ineligibility period is not automatically five years, as many people seem to think. Rather, there is a calculation that the caseworker at the County Assistance Office will perform to determine the ineligibility period. This is done by dividing the total amount gifted by the average cost of a nursing home in Pennsylvania. For example, currently (2015) that average cost is just over \$8,900 a month. So, if the total amount of gifts made in the five-year look-back period was \$89,000, then the ineligibility period would be \$89,000 divided by \$8,900, or 10 months of ineligibility. Not 60 months, but 10 months. Still, since nursing home payments in northwest Pennsylvania can range from \$6,500 to over \$10,000 or more a month, 10 months of ineligibility means \$65,000 to over \$100,000 of additional payment.

So making gifts within five years of having to apply for Medicaid can represent a substantial payment to the nursing home. Still, I think most people, while they may not like this rule, understand why it is there. It's as though Congress was saying when the Medicaid law was enacted, “Look, we're not saying you can't give away your money. It's yours and you can do with it what you like. However, what we are saying is there's going to be a trade-off. If you make gifts so that Medicaid will pay for your nursing home care, we're going to calculate how many months of nursing-home care those gifts would have paid for and then make you ineligible for Medicaid during period of time.” In the above example, if you had kept the \$89,000 rather than giving it away, you could have paid for 10 months of nursing home care (based on the statewide average), and so that's how long your ineligibility period is going to be.

But whether or not one accepts the reason for having such a rule in the first place, there are problems with how this rule works out in practice. For example, what if you gave money to your children or others for reasons that had nothing to do with Medicaid? For example, you gave your son some money to help him buy a car, or some money to your daughter to help her with a down-payment on a house. Or you gave a grandchild money for his or her birthday, or graduation, or wedding. Why should you be penalized for doing any of these if it turns out you have to go into a nursing home in the next five years?

This article will discuss one way to deal with this issue – showing that the gift was not made for purposes of qualifying for Medicaid. Next month's column will deal with another approach to resolving the issue, namely requesting a waiver of the penalty based on “undue hardship.”

Non Medicaid-Motivated Gifts: The Medicaid law provides that a gift will not create a transfer penalty if it was made “exclusively for a purposes other than to qualify

for [Medicaid].”¹ The catch is that all gifts are presumed to have been made with Medicaid in mind, *and therefore the burden is on the Medicaid applicant to prove that this was not the case*. As lawyers know, in practice who has the burden of proof on an issue often determines the outcome.

How does one “prove a negative” – that is, prove what was not in your mind when you made a gift? Simply asserting to the County Assistance Office that Medicaid eligibility was not a concern is clearly not going to be sufficient.

Sometimes the circumstances surrounding the gift may help, such as gifts made to a church, or to family members for a birthday or at Christmas time, especially when you have a long-time pattern of making the same money gifts to your church or at birthdays or Christmas.

In general, however, the applicant will need *documentation* to show the non-Medicaid purpose of a gift. Going forward, it will be important for seniors making gifts (especially if made to family members such as children or grandchildren) to create such documentation at the time the gift is made. For example, if the parent is giving money to a child to cover the down-payment on a house, or to a grandchild as a contribution towards his or her college education, writing a letter to the child or grandchild to accompany the check, explaining the purpose of the gift, would be excellent documentation. Even a note in the “memo” field of a check saying “birthday gift” or “help with car repairs” or the like would at least be something to point to in support of an argument down the road.

While seniors who get good advice will be better prepared, many seniors will not get timely advice and so will not have created such helpful documentation. Add to this the fact that seniors in nursing homes are often under great stress, that they typically have at least some degree of diminished capacity (which may have been in place for years), and that the disclosure period for gifts now extends back five years, and it is easy to see how important it will be for seniors and their families to seek professional advice.

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*The content herein is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified elder law attorney.*

**Note:** *After the changes in the Medicaid law six years ago, it is more true than ever that “time works against you” when planning for long-term care. It is important that families who have a spouse, parent or other loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advice as soon as possible. While ideally this should be done prior to admission to a nursing home, families need to realize that even after the 2006 changes to the Medicaid law, there remain opportunities for seniors to protect a significant portion of their life savings, even when facing an immediate crisis, with no advance planning. But since every day of delay in a crisis can result in \$250 of irretrievable loss, don’t delay in seeking advice.*

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<sup>1</sup> 42 U.S.C. § 1396p(c)(2)(C)(ii)

