

Avoiding Medicaid Transfer Penalties – Part II

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Medicaid is a “needs-based” public benefit program; that is, unlike Medicare, it is not enough to qualify that you are elderly or disabled and need medical care – you also have to be impoverished, spent down to just a few thousand dollars of “countable assets.” Paired with this impoverishment requirement is a “look-back period” -- any gifts made within five years prior to filing a Medicaid application have to be disclosed to the Medicaid office, and such gifts will generally create a period of ineligibility to receive long-term care Medicaid. Currently, this period of ineligibility is one month for every \$8,916.65 transferred.

Following the changes to the Medicaid law in 2006, this rule poses a serious issue for both nursing homes and their residents. This is because the Medicaid ineligibility period will not begin to run until the resident is “otherwise” eligible for Medicaid” – that is to say, in a nursing home (or receiving an institutional level of care at home) and already spent down to the Medicaid limits. Only at that point will the penalty start.

In our experience at my office over the past dozen years, we often have families with a spouse or parent in a nursing home who is ineligible for Medicaid because of gifts that were made years ago without any thought of Medicaid eligibility, perhaps as the result of forgiving a loan to a child, or simply the result of poor record keeping or lack of documentation to explain where money went. In such cases a Medicaid application filed at that time the nursing home resident’s assets have been spent down will be denied because the transfer penalties for such gifts will have just begun to run.

Both the resident’s family and the nursing home share an interest in getting the cost of the resident’s nursing home care covered. But how can the situation be corrected?

As noted in my article in the June issue of *Senior News*, one way to avoid a transfer penalty for gifts is to show that they were made “exclusively for a purposes other than to qualify for [Medicaid].” But because the Medicaid office presumes that all gifts were made with Medicaid in mind, this usually requires documentation by the applicant to show why the gift was made – to help a child with a down-payment on a house or to get a car repaired, as a wedding gift for a grandchild, etc., and in many cases such documentation is lacking.

Hardship Waivers: Another way to deal with this problem is with a “Hardship Waiver.” A nursing home resident can file a request for a waiver of the ineligibility period because of “undue hardship.”

According to the Medicaid law an undue hardship exists “...when application of the transfer of assets provision would deprive the individual (A) of medical care such that the individual’s health or life would be endangered; or (B)

of food, clothing, shelter or other necessities of life."¹ In other words, the resident will file an application disclosing the gifts and acknowledging that they would ordinarily create an ineligibility period for Medicaid, but stating that if the ineligibility period is not waived and thus Medicaid will not pay for his or her care, the now impoverished resident having no means to pay the nursing home will be discharged, resulting in the resident's life or health being endangered.

The Medicaid law also permits the nursing home to file the undue hardship request: "[T]he facility in which the institutionalized individual is residing may file an undue hardship waiver application on behalf of the individual with the consent of the individual . . . and the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days."²

Ignoring the fact that it may be impossible to get a hardship hearing scheduled, much less decided, within 30 days, there is an underlying dilemma in this procedure for the nursing home. As noted above, a hardship exists "*...when application of the transfer of assets provision would deprive the individual (A) of medical care such that the individual's health or life would be endangered; or (B) of food, clothing, shelter or other necessities of life.*"³

And if they win, the penalty is waived and everyone is happy. But what if they lose? Can the facility now discharge the non-paying resident? It would be extremely difficult to do so since they would have just argued that discharge would jeopardize the resident's health and welfare . . . and if it would, then discharge under the Nursing Home Reform Act would not be permitted. That is to say, the facility would be stuck in the middle.

Notwithstanding the almost "life-or-death" basis in federal law for granting a hardship waiver, in practice States are permitted to use more lenient eligibility criteria than the federal standards (they just can't use stricter standards). Perhaps the Pennsylvania Department of Human Services (the new name for the Department of Public Welfare) will at some point formally adopt more lenient standards in considering such waiver requests – if for no other reason than in response to pressure from an outraged nursing-home industry that would otherwise be in the position of providing residents with months of uncompensated care.

For now, though, based on our experience and anecdotal evidence from other elder law attorneys, the standard for granting an undue hardship waiver request is subject to variation from County to County and, indeed, from caseworker to caseworker, but the cases most likely to win are those for which a denial simply seems to everyone to be unfair.

¹ Deficit Reduction Act of 2005, 42 U.S.C. §1396p(c)(2)(D)

² 42 U.S.C. §1396p(c)(2)(D)(1)

³ 42 U.S.C. §1396p(c)(2)(D)

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**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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