

## The Medicaid “Look-Back” Period and Gifting – Part II

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My article in the May issue of *Senior News* explained the basic Medicaid rules regarding the five-year “look-back” period and gifting and why it is more important than ever for seniors who go into a nursing home to contact an experienced elder law attorney right away. This is important because the current Medicaid law (both federal and Pennsylvania) permits such seniors to take steps to accelerate their Medicaid eligibility while protecting a part of their life savings that would otherwise have to be spent down on their nursing care. But in such situations time works against you – every day of delay represents at least \$200 less that can be protected.

However, there are some things that seniors and their families can do that make what the Medicaid office would consider a “gift” simply disappear. Too good to be true? Well, here are some real-life examples:

Child caring for parent: We regularly meet with families in a crisis situation who have a parent who has just entered – or is about to enter – a nursing home. (The children are confused and under stress for many reasons – guilt over having to put a parent into a nursing home; bewilderment over the forms they have to sign, and sticker shock when they learn that it will cost their parent between \$75,000 and \$130,000 a year to be there.)

In many cases the parent had been receiving care for an extended period of time from one or more of the children (usually one child) – either in the parent’s or the child’s home. Rarely “medical care” as such, but help with numerous matters of daily living, which help becomes more important as the parent ages and memory declines, such as: shopping and meal preparation; laundry and housecleaning; financial management and paying bills; transportation to doctor visits; reminders about taking medications at the right time and in the right dosages; assistance with the regular “activities of daily living” – eating; dressing, bathing, toileting, and transferring from bed to a chair; and simply being there if the parent is at risk of falling.

While in most cases the child is doing this without any expectation of payment, often parents want to pay their child, especially as the work becomes more demanding and time-consuming. It is not unusual to find a child who has cut back to part-time at his or her job, taken a leave of absence, or simply left a job entirely when the parent needs someone around full-time. In such cases it seems entirely appropriate to the entire family for the parent to pay this child for such care.

Unfortunately, in our experience many Medicaid Office caseworkers do not share this view. They usually take the position that children are supposed to be providing such care to their parents for free, and therefore any payments for such care made within five years prior to filing a Medicaid application by a parent to a child – even if carefully documented by regular check each month, and even if the payment is less than what the parent would have paid to hire outside help to do the same thing – are penalized as gifts, creating additional time that the parent will have to pay out-of-pocket for care in the nursing home before being eligible for assistance from Medicaid. And, in our experience, if their decision is appealed to a “fair hearing,” the Administrative Law Judge (who oddly

is under the supervision of the Department of Public Welfare) typically agrees with the Medicaid caseworkers.

The only way to get around this problem is for the parent and child to draw up and sign a written care agreement, specifying in detail the care that the child will be providing to the parent and the payment the parent will be making to the child. In our experience payments made under such agreements will not be treated as gifts provided:

- the agreement is properly drafted;
- the payment amount is reasonable for the services provided; and
- the payments were made on or after the date the agreement was signed. (In other words, it does not work to draft an agreement after the fact to memorialize payments parent had made to her caregiver child in the past.)

Thus, in the example mentioned in last month's article of mom having made \$75,000 of "gifts" to one or more children within the five-year look-back period, if any part of those "gifts" were payments mom made to a caregiver child that satisfied the three requirements listed above, that amount of "gifts" would disappear.

Articles in the coming months will give other real-life examples of how good record keeping and the proper documents can make what would otherwise be disqualifying gifts simply disappear.

*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:** *With the restrictions in the Deficit Reduction Act that came into effect in 2006, 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 when there is at least five years before such care will be needed, families need to realize that even with the new restrictions in the DRA, there remain opportunities for seniors to protect a significant portion of their life savings when facing an immediate crisis, with no advance planning. But every day of delay represents a potential \$220 of irretrievable loss, so seek advice sooner rather than later.*

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