

Medi-Cal Eligibility: The Transfer Penalty

In previous editions of this weekly email newsletter, we have explored the need for long-term care planning as part of a comprehensive estate plan, the ethics of Medi-Cal planning, how to find and pay for the right nursing home, and resource limitations which apply to Medi-Cal eligibility. Last week, we saw how to turn bad assets (e.g., cash and investments) into good assets (e.g., a house, a car, or an annuity), a strategy known as asset conversion, and thereby qualify for Medi-Cal long term care benefits .

But why not just move into a nursing home on Monday, give away all your assets to your children on Tuesday, and qualify for Medi-Cal on Wednesday? Because Congress imposed a penalty on people who transfer assets without receiving fair value in return (translation: gifts and/or sales of property for below fair market value).

This penalty is a *period of time* during which the person transferring the assets will be *ineligible* for Medi-Cal long term care benefits. The penalty period is determined by dividing the amount transferred by what Medi-Cal determines each year to be the average private pay rate ("APPR") (translate: cost) of nursing home care in California. For transfers made during 2001, the APPR is \$4,163. The period of ineligibility starts on the first day of the month of the transfer.

Example: In California, if a Medi-Cal applicant made gifts to one individual totaling \$72,000 (a state in which the average cost of nursing home care is \$4,163 a month), he or she would be found to be ineligible for Medi-Cal long term-care benefits for 17 months ($\$72,000 \div \$4,163 = 17.295$; Medi-Cal ignores all fractions of a month); whereas, if the same applicant made gifts to one individual totaling \$4,100, he or she would be found to be eligible for Medi-Cal long-term care benefits (because the period of ineligibility calculates as follows: $\$4,100 \div \$4,163 = 0.985$, again rounding down to zero).

Another way to look at the above example is that for every \$4,163 transferred, an applicant would be found to be ineligible for Medi-Cal nursing home benefits for one month.

In California, the maximum number of months a person can be found to be ineligible for long-term care benefits is 30 months, whereas for gifts made in the other 49 states, there is potentially no limit to the number of months a person can be found ineligible.

Example: In California, the period of ineligibility for the transfer of property to one individual worth \$400,000 would be 30 months, whereas the other 49 states would impose a period of ineligibility for long term care benefits of 96 months from date of transfer ($\$400,000 \div \$4,163 = 96.1$). One good reason to live in California despite our traffic and high cost of living!

However, Medi-Cal will only look at transfers made during the 30 months preceding the first of the month in which an application for Medi-Cal long-term care benefits is made. This is called the "look-back period." In the other 49 states, the look-back period is 36 months.

This means that people who make large transfers must be careful not to apply for Medi-Cal before the 30-month, or 36-month, look-back period passes, as the case may be.

Example: To use the above example of the \$400,000 transfer, if the individual made the transfer on January 1, 1998, and waited until after June 30, 2000, to apply for Medi-Cal -- 31 months later -- the transfer would not affect his or her Medi-Cal eligibility for long-term care benefits. However, if that same individual applied for benefits in May 2000, only 29 months after transferring the property, he or she would have to wait 2 months (remember: the maximum period of ineligibility would be 30 months from the date of the gift) before becoming eligible for long-term care benefits, whereas that same individual in any of the other 49 states would have to wait until after

December 31, 2006, to apply for Medicaid (remember that Medicaid is called Medi-Cal in California), because his or her penalty period would be 96 months from the date of the transfer.

Another interesting quirk of California law: each transfer is evaluated independently and is not aggregated with all other transfers, giving rise to the following example:

Example: Joe, a nursing home patient, gives away \$4,100 to his brother and \$4,100 to each of his three adult children, for a total of \$16,400, on January 1, 2001, a time in which the APPR is \$4,163. Joe then applies for Medi-Cal long-term care benefits. Each gift would be independently evaluated to see if a period of ineligibility would result from that particular gift. As we saw in our previous examples, no period of ineligibility would exist for a gift of \$4,162 to one individual. Thus, the gift to Joe's brother would not be penalized, nor would the gifts to each of Joe's children. In the other 49 states, Joe's gifts would result in a period of ineligibility of 3 months ($\$16,400 \div \$4,163 = 3.9$, again rounding down) because all gifts are aggregated in determining the transfer penalty. Again, another good reason to live in California!

Example: To continue my preceding example, if Joe gave away \$15,000 to his brother and \$10,000 to each of his three adult children, for a total of \$45,000, on January 1, 2001, Joe would be found to be ineligible for Medi-Cal long-term care benefits of 3 months on account of the gift to his brother ($\$15,000 \div \$4,163 = 3.6$, again rounding down), and 2 months on account of the gifts made to each of his three children ($\$10,000 \div \$4,163 = 2.4$, again rounding down). Penalty periods are not aggregated in California. Thus, the penalty period for Joe's gift to his brother would expire on March 31, 2001, while the penalty periods for Joe's gifts to his children would all expire simultaneously on February 28, 2001. Since the brother's penalty period is longer than the penalty period for the children, Joe would be found to be ineligible until March 31, 2001. In the other 49 states, Joe's gifts would be aggregated and would result in a transfer penalty of 10 months ($\$45,000 \div \$4,163 = 10.8$, again rounding down), making Joe ineligible for long-term care benefits until after October 31, 2001. Please note that annual exclusion gifts of \$10,000 to one individual during a calendar year are penalized even though they are exempt from gift taxes. Remember that federal tax law is not the same as state Medi-Cal law.

Exceptions to the Transfer Penalty

Transferring assets to certain recipients will not trigger a period of Medi-Cal ineligibility. These exempt recipients include:

- (1) A spouse (or a transfer to anyone else as long as it is for the spouse's benefit, but note that separate asset rules apply to a married couple: see previous articles);
- (2) A blind or disabled child;
- (3) A trust for the benefit of a blind or disabled child;
- (4) A trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances).

In addition, special exceptions apply to the transfer of a home. In addition to the preceding list of exempt recipients, the Medi-Cal applicant may freely transfer his or her home to the following individuals without incurring a transfer penalty:

- (1) A sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home;
- (2) A "caretaker child," who is defined as a child of the applicant who lived in the house for at least two years prior to the applicant's institutionalization and who during that period provided care that allowed the applicant to avoid a nursing home stay; or

(3) Anyone, provided the transferor retains the right to return to the home after the transfer.

Congress has created a very important escape hatch from the transfer penalty: the penalty will be "cured" if the transferred asset is returned in its entirety, or it will be reduced if the transferred asset is partially returned.

Is Transferring Assets Against the Law?

You may have heard that transferring assets, or helping someone to transfer assets, to achieve Medi-Cal eligibility is a crime. Is this true? The short answer is that for a brief period it was, and it's possible, although unlikely under current law, that it will be in the future.

As part of a 1996 Kennedy-Kassebaum health care bill, Congress made it a crime to transfer assets for purposes of achieving Medi-Cal eligibility. Congress repealed the law as part of the 1997 Balanced Budget bill, but replaced it with a statute that made it a crime to advise or counsel someone for a fee regarding transferring assets for purposes of obtaining Medi-Cal. This meant that although transferring assets was again legal, explaining the law to clients could have been a criminal act.

In 1998, Attorney General Janet Reno determined that the law was unconstitutional because it violated the First Amendment protection of free speech, and she told Congress that the Justice Department would not enforce the law. Around the same time, a U.S. District Court judge in New York said that the law could not be enforced for the same reason. Accordingly, the law remains on the books, but it will not be enforced. Since it is possible that these rulings may change, you should contact an elder law attorney before filing a Medi-Cal application. This will enable the attorney to advise you about the current status of the law and to avoid criminal liability for the attorney or anyone else involved in your case.

Editor's Note: This article is one in a series of articles dedicated to the need for long-term care planning in a comprehensive estate plan and how to pay for nursing home care without going broke. This information is for general informational purposes only and does not constitute legal advice. Please do not rely on the limited information given here. Medicaid is a highly complex area of the law; it varies from state to state and even within a particular state. *Unfortunate and costly mistakes can be made if you do not know what you are doing.* Before taking any steps to protect assets, you are strongly urged to consult with an elder law attorney who is competent in this area of the law so that you will understand all of the ramifications of your actions, including but not limited to property, estate, gift, and income tax; financial and estate planning considerations; and even possible *criminal sanctions*.

If you need help in planning for long-term care as part of a comprehensive estate plan or finding the right nursing home or paying for it without going broke, please give us a call. We can help!

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