



THE COULSON
LAW GROUP

MEDICAID PLANNING TODAY

www.QualifyForMedicaid.com

Volume 2, Issue 2



Member National Academy
of Elder Law Attorneys

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TRANSFER PENALTIES AND THE NEW MEDICAID RULES (Or, Why Trying to Figure Out Whether, and If So For How Long, Someone Will Be Ruled Ineligible For Benefits Is About to Get Really Confusing)

In the first of our series of newsletters about the major changes Congress made in the Medicaid eligibility rules in passing the Deficit Reduction Act of 2005, we outlined the most important provisions of the new law. The "look-back" period has been increased from three years to five. Penalties for transfers made on and after February 8, 2006 (the day the law was signed) will start to run in the month in which the person applies and would otherwise be eligible for benefits, instead of in the month(s) when the transfer(s) was or were made. Caseworkers will no longer be permitted to "round down" in calculating transfer penalties.

We suggested that, as a result of these changes, many nursing home residents who run out of money and then apply for Medicaid are going to be in for a shock. Although they have no means of paying for their care, their applications are going to be denied.

So, who's going to be okay, and who's not going to be okay? Well, that's where it's about to get really confusing.

For the next five years, until February 8, 2011 – after which date all transfers within five years will be covered by the new rules – two different sets of rules will apply in determining whether a person who applies for Medicaid long-term care benefits might be ruled ineligible on account of gifts or other transfers of property for less than fair market value ("transfers," for short).

In fact, just trying to explain what's going to happen gets really confusing, so please bear with us.

To try to see how this will work, imagine that four nursing home residents – let's call them Mary, Ann, Tom and Jim – run out of money and apply for Medicaid in May 2006. Each made \$30,000 in transfers within the past 5 years, and as the law requires, they disclose them on their Medicaid applications. Mary made all of her transfers in March 2004. Ann made \$20,000 in transfers in March 2003 and \$10,000 in March 2006. Tom made all \$30,000 of his transfers in December 2005. Jim made all \$30,000 of his transfers in March 2006.

In other words, they all did the same thing, just at different times. As it turns out, that's going to make a big difference.

All of Mary's transfers will be covered by the old rules. Her "penalty period" – the number of months a person is ineligible for benefits because of transfers – will have expired before she applied. She will be approved immediately for benefits.

The March 2003 transfers Ann made won't affect her eligibility, because they will be covered by the old rules, and the penalty period will have expired. However, the March 2006 transfers will cause a penalty period of between three to four months (maybe a little less, oddly enough, if she's in an expensive nursing home in Illinois ... but not Missouri).

That penalty period will start in May 2006, the month when she applies for benefits. Unless the nursing home allows Ann to stay there as an unpaid guest, (the nursing home will be legally required to let Ann stay if she cannot be discharged

to a safe place where her needs can be met) she or her family will have to somehow figure out a way to pay out of pocket for her care for May, June, July, and part of August. Keep in mind that Ann's already broke, or she couldn't apply at all.

All of Tom's transfers will be covered by the old rules. However, that doesn't mean that he won't have a transfer penalty. In fact, he will have a transfer penalty of 10 months (maybe a little shorter in Illinois). Note that it isn't 10 months and a few days, because the penalty period under the old rules would be "rounded down." But the penalty period will run from the month when the transfers were made (December 2005) rather than the month of application. Therefore, Tom will be ineligible through September 2006 (maybe July or August in Illinois).

All of Jim's transfers will be covered by the new rules. Therefore, he will be ineligible for 10 months and several days (again, perhaps a little less in Illinois), and his penalty period will not start until May 2006, when he applies. He will not be eligible until March 2007!

Sound confusing? It should, because – well – it just is. Four people made transfers in the same total amount within the look-back period, and yet they will have four very different outcomes. Mary will be fine. Ann and Tom will have a problem, but maybe their families will be able to come up with the money to pay for their care while they are ineligible, or maybe their nursing homes will decide (or be required) to eat the cost of their care during the penalty period. Either Jim or his nursing home will have a major problem. A lot of money and months stand between Jim and Medicaid eligibility.

In trying to understand how this will work in the future, keep in mind that as each month goes by, there will be a month's less transfers covered by the old rules, and a month's more transfers covered by the new rules. There will be less and less Marys, and more and more Jims.

And \$30,000 isn't really a big number, relatively speaking. For some people, this will be a lot worse. Keep in mind, too, that under the new rules, there will be no rounding down and transfers will be accumulated. Ann's outcome would be exactly the same if she had given away money in little dribs and drabs – a few hundred bucks to help out one of her kids here, a \$500 hurricane

relief donation there, \$1,000 a year in birthday and holiday presents, contributions to her place of worship ... they all will add up.

So what's the moral of the story?

The **only** way to prevent situations like Ann's and Tom's and Jim's from happening will be for the nursing home resident (or better yet, the *pro-spective* nursing home resident) to see a good elder law attorney – the sooner, the better – who will help carefully plan out (a) the timing of filing of the application, (b) whether and if so to what extent anything that was given away should be given back, if possible, before the application is filed, and (c) how to pay the nursing home during any penalty period that can't be avoided.

Actually, as we will discuss in a future newsletter, there are still ways for people to protect at least a part of their assets and still qualify for Medicaid—but only if it is done very carefully, as part of a long-term care plan developed by a competent elder law attorney.

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We can cater presentations to meet your time requirements. For more information contact our Director of Community Education and Outreach, Beth Frame, at (314) 567-9292 or (618) 659-9292.

Medicaid Planning Today is written by the attorneys of The Coulson Law Group, Wesley J. Coulson and Joseph Higes, and is published as a service of The Coulson Law Group, 1001 Craig Road, Suite 224, St. Louis, Missouri 63146; 107 Southpointe Drive, Suite 2, Edwardsville, Illinois 62025. This is for general informational purposes only and does not constitute legal advice. For specific questions, you should consult a qualified attorney.

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