

## **Medicaid Transfer Penalties**

Congress enacted a new law on February 8, 2006, which will make it extremely difficult for seniors to qualify for Medicaid to help pay for their nursing home care in the future. These reforms were buried in the proposed budget bill. We believe these so-called reforms are unfair to all of us and need to be changed by Congress.

The major change creates a floating penalty during a five-year period before someone files for Medicaid to help pay for nursing home care. How does the floating penalty work? Dad dies and leaves Mom a \$50,000 life insurance policy and \$200,000 in CDs. Mom gives \$30,000 to her children; \$10,000 to a charity; and \$10,000 to her church—just in case she has to enter a nursing home later. Mom has a stroke the next month and goes to the nursing home. She spends \$200,000 on her care over the next four years and then applies for Medicaid. Imagine the shock she will face when she finds out the new law makes her ineligible for Medicaid for a year—when she is out of money. Who will pay for her care? How will the nursing home be paid?

The new penalty rule has two parts. First, you must determine the length of the penalty. The length of the penalty is determined by taking the amount gifted and dividing this amount by the average cost of nursing home care in Indiana, which is currently \$3,960 per month. In the last example, the total gifts of \$50,000 are divided by \$3,960 to determine that the period of ineligibility created by the gifts is 12.63 months.

The second part of the rule states that the penalty for a gift starts on the date Mom entered the nursing home and she has \$1,500 or less in her name within five years of making the gift. This is what makes Mom ineligible for Medicaid for 12.63 months once she is in the nursing home and out of money.

The rule for gifts before February 8, 2006, imposed a transfer penalty from the date Mom made a gift, not some future unknown date.

This is easiest explained by example. Mom gives her son \$10,000 in March 2006. Mom gives her church \$200 per month for 36 months. Mom gives Christmas gifts of \$500 for three consecutive years. Mom goes into the nursing home, pays for her care for a year, and runs out of money. This means Mom has given away \$10,000 + \$7,200 + \$1,500, for a total amount transferred of \$18,700. This amount is divided by the average cost of nursing home care in Indiana of

\$3,960. These transfers apparently make Mom ineligible for Medicaid for 4.72 months, when she has no money to pay for her care.

The new law now creates a penalty period for even the smallest of gifts. When Mom gives the kids \$500 total at Christmas, she is not aware that she has made herself ineligible for 3 days of Medicaid care in the nursing home if she enters a nursing home at any time in the next five years and runs out of money!

Indiana has a little used law entitled "Contribution to Support of Parents" (IC 31-16-17-1). This law allows the Division of Family Resources or the prosecutor to sue children to compel the support of their parent if the parent is financially unable to furnish the parent's own necessary food, clothing, shelter, and medical attention. The children are even responsible for the attorney fees incurred in compelling them to pay for the care for Mom or Dad.

The new law creates a new Hardship Waiver program that requires new regulations. The Hardship Waiver program will allow nursing homes and/or nursing home residents to ask that the penalty period be waived for a specific individual because the penalty will deprive the individual of medical care, food, clothing, shelter, or other necessities of life. We will not know what this means until the required regulations are implemented.

How are we to advise seniors in the future? Should we discourage them from making gifts to their church, charity, and their family because they may need nursing home care in the future? We cannot believe this is the message Congress has sent to our seniors.

The new law still permits transfers of assets if a person can prove "the assets were transferred exclusively for a purpose other than to qualify for medical assistance." While this requires you to prove a negative—which is very hard to do—it can be done. This is likely to be the case with those who tithe to a church.

I am advising my clients to continue to make contributions to the church if they have a history of making similar contributions. Medicaid caseworkers in Indiana have taken the position in a few cases that contributions to a church create a period of ineligibility the same as a gift to a child. An Administrative Law Judge has yet to rule on this issue. Clients should not make a large new gift to a church without seeking legal advice.

Seniors will need to consult with an elder law attorney well in advance of needing nursing home care. These new transfer penalties apply to transfers made on or after February 8, 2006. Transfers prior to that date are under the old rules.

Gifts to other charities should be treated as gifts to churches. When a person has a pattern of making similar gifts over the years, the continued support of a charity should be permitted under the new gift rules. Gifts to church and charities will generally be treated as a transfer once a person has limited resources and is facing nursing home care.

The new reforms are particularly harsh for anyone who would purchase or own an annuity after the law is enacted. The law requires the State to be the primary or contingent beneficiary of any new annuity policy. The proceeds of any such annuity are intended to repay the State for any medical assistance furnished to an individual or their spouse. If the State is not named as beneficiary of your annuity, you and your spouse have made a transfer under the Medicaid laws, triggering a floating penalty for the next five years, even though you still have all of the money invested in the annuity. This law seems to require action by the State of Indiana before it becomes effective.

For example, Dad purchases an annuity for \$50,000 naming Mom as primary beneficiary and the children as contingent beneficiaries. The State is not named as a beneficiary, so there is a floating penalty assessed even if the children receive nothing. Four years later Mom has died, the annuity is gone, and Dad has to go to the nursing home. He has run out of funds and applies for Medicaid. Imagine the shock the family will experience when they find out he is not eligible for Medicaid because he bought an annuity.

The new law also adversely affects existing annuities. If Mom or Dad is in the nursing home and on Medicaid, the State will now become the remainder beneficiary at the second death when they apply for Medicaid or at the redetermination date.

Anyone over age 50 should have grave reservations about purchasing an annuity in the future. They should also seriously consider cashing in existing annuities. Americans invested over \$23 billion in annuities for retirement in 2004 alone. The new law will result in a dramatic change in how we pay for our retirement.

The new law changes the fair hearing rules for married couples for people entering a nursing home on or after February 8, 2006. The old law let Mom or Dad

keep enough assets to live on if their spouse entered the nursing home and the community spouse had a low income. This recognized the income was often lost at the death of the institutionalized spouse. The new law allocates income rather than assets to the community spouse, allowing the community spouse to have fewer resources to live on.

The new law allows continuing care retirement communities to require residents to spend on their care any resources declared for the purpose of admission. Clients should have admission agreements reviewed by their lawyer and explained to them before they sign such an admission form.

The new law creates changes in the long-term care insurance industry. The Indiana Partnership Program will still be able to sell complete asset disregard policies. Dollar for Dollar disregard policies will also be sold. For each dollar a partnership policy pays to the nursing home, you will be able to keep an additional dollar when you qualify for Medicaid. For example, a single individual can usually only keep \$1,500 when he or she qualifies for Medicaid. If the individual's dollar-for-dollar disregard policy pays the nursing home \$100,000 then the individual can keep \$101,500 and qualify for Medicaid.

We will need to advise our clients to consider purchasing five years of nursing home insurance. This will make the policy more expensive, so many will not buy the insurance or will drop it when they retire and their income is lower.

Many people believe they can gift away their annual exclusion of \$10,000 (effective January 1, 2006, \$12,000) without penalty, and without the donor having to file a gift tax return. Medicaid will not permit a gift of \$10, let alone \$12,000 if a person will be in a nursing home and out of funds at any time within the next five years. We must make sure the public is aware that even the smallest gifts can trigger a period of ineligibility for needed Medicaid benefits.

My elderly clients all want three things—(1) to be treated with dignity, (2) not to be a burden to anyone, and (3) to leave some of what they have worked hard for all of their lives to their children. Many of my clients have scrimped and sacrificed for years so they can leave some small inheritance to their children. For many, Congress has now made this impossible. We encourage you to contact representatives in Congress and ask that these laws be changed.

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**You can contact members of the U.S. House of Representatives at (202) 225-3121 (web page: [www.house.gov](http://www.house.gov)). You can contact members of the U.S. Senate at (202) 224-3121 (web page: [www.senate.gov](http://www.senate.gov)).**