

Medicaid Transfer Penalties (or “Why and When Not to Gift”)

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Introduction to Medicaid Transfer Penalty Rules

Medicaid is the government benefits program which pays for expenses associated with long term care or nursing home expenses. Eligibility for the Medicaid program depends, in part, on the individual applicant satisfying the required definitions of being “poor enough” in terms of countable assets and income. Stated another way, Medicaid is a needs-based program which requires an analysis of the individual’s personal balance sheet. The South Dakota Department of Social Services (DSS) administers the Medicaid program.

Because Medicaid is intended to be a program for the needy, and not for the wealthy, there are sets of rules which deter individuals from giving away their wealth as a means to achieve eligibility. This article briefly describes the rules which restrict gifts in connection with Medicaid eligibility.¹

A gift – as that term is used in this article – means any asset transferred to someone other than a spouse for less than fair market value. Thus, a tractor with a fair market “arm’s length” value of \$10,000 which is sold to an individual’s son for \$3,000 is deemed to be a gift of \$7,000 (the difference between the fair market value and the amount paid).

The Look Back Period

The look back period is aptly named. It means the period in which gifts must be reported when applying for Medicaid. If a gift falls outside of the look back period, it is ignored for Medicaid eligibility purposes. If a gift falls within the look back period, then a transfer penalty is assessed. Generally speaking, the look back period is five years prior to the date an individual is institutionalized and applies for Medicaid.² One “looks back” over this period to ascertain whether any gifts were made. If there were gifts made, then a transfer penalty calculation is undertaken.

¹ There are additional important considerations whenever substantial gifts are contemplated including (a) the federal gift and generation skipping transfer taxes; (b) the possible loss of “step up” treatment for capital gains purposes; and (c) the loss of control and enjoyment of assets that have been given away.

² ARSD 67:46:05:06:01(2). The look back period is 3 years for gifts prior to February 6, 2006. ARSD 67:46:05:06:01(1). Gifts after that date are subject to a 5 year look back.

The Transfer Penalty

When a gift occurred within the look back period, DSS calculates the “period of ineligibility” for Medicaid benefits which results from the gift. This period is determined by dividing the gifted amount by the monthly state-wide average of long term care costs for private pay individuals.³ Essentially, DSS applies a period of Medicaid ineligibility which is based on the theory that if the individual hadn’t made a gift, there should be a penalty imposed for the length of long term care that the individual should have been able to pay for his or her own care.

In 2009, the monthly statewide average for private pay long term care was determined to be \$4,679.99 (based on \$153.86/day). Thus, for example, an individual who made a gift of \$4,680 within the look back period would receive a transfer penalty of one month.⁴

Transfers to irrevocable trusts are treated as gifts which trigger transfer penalties except for certain types of trusts (discussed elsewhere).

Exceptions

There are limited exceptions to the application of the period of ineligibility to gifts occurring within the look back period for Medicaid eligibility purposes which are discussed below.

(a) Undue Hardship⁵

DSS has the ability to waive the transfer penalties if clear and convincing evidence is presented that the individual has no other means of support and denial of Medicaid benefits would deprive him or her of food, clothing, shelter or other necessities of life or medical care, endangering his or her health or life. This is known as the undue hardship exception.

Before undue hardship can be claimed, however, the return of the gifted asset must be demanded from the donee. If this fails, the donee must then be sued. This presents a genuine challenge since there is generally no legal basis to seek the return of a gift.⁶

³ ARSD 67:46:05:09.

⁴ DSS may apportion the transfer penalty between spouses if both are in long term care. ARSD 67:46:05:09:02.

⁵ ARSD 67:46:05:10.

⁶ A legal claim for the return of a gift could be made if the donor was under duress, incapacitated, mistaken or under undue influence, but in these circumstances it is

(b) Rebuttal of Intent to Transfer⁷

DSS assumes that any gifts within the look back period were carried out with an intent to achieve Medicaid eligibility. This presumption can be rebutted if it can be shown that there were other resources at the time of the gift which met the individual's care and maintenance needs and there was no evidence of a medical condition which would have required long term care or increased expenses beyond the current means of financial support.

Rebutting the presumption is often difficult since it requires the individual to show an absence of evidence. Moreover, the best witness for rebutting the presumption is usually the individual who has entered a long term care facility and may be incapacitated and unable to testify.

(c) Certain Transfers of Home Property⁸

A gift of an individual's home does not result in a transfer penalty if it is gifted to (1) a son or daughter under age 21; (2) a blind or disabled son or daughter; (3) a son or daughter who has resided in the home for at least two years prior to the commencement of long term care who provided care which enabled the parent to stay at home; or (4) a brother or sister who had an equity interest in the property and who resided there at least one year prior to the commencement of long term care. Generally, this type of transfer is accomplished by quit claim deed which is filed with the local Register of Deeds office.

(d) Transfers to Blind/Disabled Persons⁹

Any gift to a blind or disabled son or daughter does not trigger a transfer penalty. A gift to any disabled person – even if not related – is also permitted without the imposition of a transfer penalty so long as the donee is under age 65.

probably not proper to characterize the transfer as a “gift” since the requisite donative intent would have been absent.

⁷ ARSD 67:46:05:11.

⁸ ARSD 67:46:05:16.

⁹ ARSD 67:46:05:17.

(e) Return of Gifted Assets¹⁰

If a gifted asset is returned to the individual, the Medicaid application may be resubmitted and all eligibility conditions will be reevaluated. This rule recognizes the ability of an individual to “cure” the transfer penalty if the asset or its fair value is returned.

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

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¹⁰ ARSD 67:46:05:07.