Medicaid Update – Look Out!

ANTI ROBIN HOOD OR WHAT?

By

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1. Lookback Period is extended to 5 years from 3 for all transfers!

The lookback period for all transfers is being extended to five years from three years. Now, there is a five-year lookback only for transfers into a trust, whereas a three-year lookback applied to transfers to children.

The impact will be to extend the penalty/disqualification period beyond three years when the value of the property gifted exceeds $250,560. Under existing law, if $400,000 was transferred to children, the tentative penalty period would be 57 months, but effectively would end in 36 months, provided a Medicaid application was not filed until the 37th month after the transfer. [***Act Section 6011(a)***] Deficit Reduction Act of 2005 (hereinafter the "Act"): The effective date applies to transfers made on or after the date of enactment of the Act.

2. Beginning Date of Penalty is date of nursing home admission:

The beginning date for the purpose of determining the penalty period has been changed from the date of the transfer to the date of admission in the nursing home and at such time as the individual is eligible for medical assistance, but for the transfer, or the first day of a month during which or after assets have been transferred, whichever period is later. This means that the penalty will not begin to run until the individual is admitted to the nursing home so it is important that the application not be filed within 5 years of the transfer. The effective date of this amendment shall apply to transfers made on or after the date of enactment of the Act. [***Act Section 6011(b)***]

3. Annuities:

Under existing law, the purchase of an annuity by an individual applying for MassHealth is not considered a disqualifying transfer provided the annuity payment period did not exceed the individual's life expectancy. Additionally, the annuity itself was not considered an "asset."

The usual beneficiary of the annuity would be the children so that, if the individual died before the life expectancy (a likely scenario in the case of a Medicaid patient), the remaining annuity payments would be paid to the children thereby by-passing the estate recovery provisions. The Act requires that the estate be named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant or the estate is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value. Otherwise, the purchase of the annuity will be considered a disqualifying transfer of assets. [***Act Section 6012(b)***]

4. Notification Requirements:

A state must require as a condition of medical assistance that the application of the individual discloses a description of any interest the individual or community spouse has in an annuity, regardless of whether the annuity is irrevocable or was treated as an asset. The application form must include a statement that the state becomes a remainder beneficiary under any such annuity or similar financial instrument by virtue of the provision of such medical assistance. [***Act Section 6012(a)***]

It is unclear whether the purchase of the annuity by the community spouse is subject to the beneficiary designation requirements. Under existing law, a community spouse can purchase an annuity with the so-called "excess resources" and become the annuitant for life and then have the annuity paid to the children after the community spouse dies, thereby by-passing the institutionalized spouse and the estate recovery provisions. The general consensus is that the new rules do apply to annuities purchased by the community spouse.

Example: A married couple has $300,000 in cash/countable assets, $99,540 is exempt for the community spouse and the institutionalized spouse is permitted to keep $2,000 for a total of $101,540. The difference of $198,460 will be considered excess resources, which, unless annuitized by and for the benefit of the community spouse, will need to be spent on nursing home care before the institutionalized is eligible for assistance.

Under the Act, the technique will still work but the beneficiary of the annuity must be the state. The effective date of the annuity sections apply to transactions (including the purchase of an annuity) occurring on or after the date of enactment of the Act.

5. Income First Rule Required:

Under existing law, the community spouse is entitled deemed to need at least a certain minimum amount of income each month. The minimum amount is $1,604 and the maximum amount is $2,488.50. This rule has not changed.

If the community spouse's income (meaning social security and retirement income) is less than this amount, the community spouse is permitted to keep not only the $99,540, but any other assets whether these can otherwise be considered excess resources, to the extent such assets, when invested at a bank monitor rate generates income to bring the community spouse to

the applicable minimum or maximum income level. This is an alternative to having the community spouse purchase the annuity.

The Act will require that before the community spouse is permitted to keep additional so-called excess resources, any income payable to the institutionalized spouse, such as social security and retirement income, would first be allocated to the community spouse to bring the community spouse to the applicable income level before any excess resources are permitted to be retained. The result here is that when the community spouse dies, the income stream ends and, since the community spouse was not permitted to retain assets, all assets, with the exception of the $99,540, will likely be spent on care and now the community spouse becomes a welfare recipient. A terrible result! [**Act Section 6013**] The effective date applies to transfers and allocations made on or after the date of enactment of the Act by individuals who become institutionalized spouses on or after such date.

6. Disqualification for Assistance for Individuals with Substantial Home Equity:

Under existing law, an individual (and more importantly an individual's spouse) can retain ownership of a home with no limit on its value. The Act changes this rule by limiting the amount of home equity to $500,000 (or $750,000 if the state chooses to make an adjustment from the federal rule of $500,000). The effect of this rule is that only the excess equity will be countable and the Act specifically authorizes a reverse mortgage to reduce the amount of the equity.

Under prior law, while a single individual who owned a home would be eligible for Medicaid immediately, notwithstanding the ownership of the home and without regard to value, the home was always subject to estate recovery if the home was a so-called "probate asset." In the case of a couple, however, the property would be transferred to the community spouse (who would then disinherit the institutionalized spouse) and fortunately, the new rule does not apply if the home is lawfully occupied by the spouse of such individual or by such individual's child who is under age 21 or a child who is blind or permanently and totally disabled.

The amount of equity, which can be retained, is to be adjusted by the Consumer Price Index each year, provided the increase is rounded to the nearest $1,000. The effective date of this section applies to individuals who are determined eligible for medical assistance with respect to nursing facilities based on an application filed on or after January 1, 2006.
[**Act Section 6014**]

7. Requirement to Impose Partial Months of Ineligibility:

(a) States will not be permitted to round down or otherwise disregard any fractional period of ineligibility as a result of the disposal of assets. [***Act Section 6016(a)***]

(b) If an individual makes multiple fractional transfers of assets in more than one month for less than fair market value, the state may determine the period of ineligibility by treating the total cumulative uncompensated value of all assets transferred by the individual

during all months on or after the lookback date, and the beginning date will be the earliest date applicable to any such transfers. [***Act Section 6016(b)***]

8. Inclusion of Transfers of Certain Notes and Loans:

The term "asset" is now defined to include (i) funds used to purchase a promissory note, loan or mortgage, unless such note, loan or mortgage has a repayment term that is actuarially sound (meaning likely to be paid before the death of the individual based upon life expectancy tables), (ii) provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments made, and (iii) prohibits the cancellation of the balance upon the death of the lender. [***Act Section 6016(c)***]

9. Inclusion of Transfers to Purchase Life Estates:

The term "asset" will include the purchase of a life estate interest in another individual's home, unless the purchaser resides in the home for a period of at least one year after the date of purchase. The effective dates apply to payments made for calendar quarters beginning on or after the date of announcement of the Act, without regard to whether Final Regulations to carry out such amendments have been promulgated by such date. [***Act Section 6016(d)***]