

TRANSFER OF RESOURCES

A transfer of resources as defined by Medicaid is a voluntary gift or change of ownership of a resource without receiving fair market value in return. If a voluntary transfer of any resources for less than fair market value has been made within the "look back" period prior to an application for Medicaid, it is presumed that the transfer was made to become eligible for Medicaid. If a transfer has been made during this "look-back" period a penalty period is assessed, during which Medicaid is denied. Transfers of resources between spouses do not generate a penalty. Transfers of resources to children may generate a penalty.

MEDICAID CHANGES UNDER THE DEFICIT REDUCTION ACT OF 2005 Effective at the Federal level February 8, 2006. These rule changes are retroactive back to February 8, 2006 in Colorado for any transfers made on or after that date.

- **Lengthening the Look Back Period**

The look-back period is now 60 months rather than 36 months starting February 2006.

This includes outright transfers as well as transfers into a trust.

The look-back period is the period of time within which Medicaid is permitted to review financial transactions of the applicant to determine whether any of those actions would result in Medicaid disqualification. It begins with the date of the application and goes backwards in time.

This will make the application process more difficult and could result in more applicants being denied for lack of documentation, given that they may need to produce five year's worth of records if asked to do so.

- **For transfers made on or after February 8, 2006** the look back period is **5 years** (60 months) prior to the date of application.

- The transfer is evaluated as follows:

The amount of transfer is divided by \$5,991 in 2009 which will determine the number of months the individual is not eligible for Medicaid. (This figure changes annually on January first.) **The new rules states: The period of ineligibility begins on the later of the following dates:**

- The first day of the month after the month the transfer occurred, or
- The date on which the individual would be financially eligible for Medicaid services.

Example: \$50,000 given to a child on April 15, 2006. \$50,000 divided by \$5,991 = 8.3 The senior has a stroke on July 1, 2007 and goes to a nursing home. She uses her savings to pay private pay until she is down to \$2,000 on July 1, 2008. She is within the 5-year look back period. Under the new law her transfer penalty period of ineligibility of 8.3 months **will not begin until July 1, 2008**, when she meets the asset amount for Medicaid. Under the new rule the penalty period does not begin until the nursing home resident is out of funds, meaning she cannot afford to pay the nursing home.

Purchasing annuities after February 8, 2006 will be subject to new rules as well.

Annuities purchased after this date will be treated as a transfer without fair consideration unless the Colorado Department of Human Services is named as the remainder beneficiary in first position for reimbursement of the total amount of Medicaid assistance paid on behalf of the individual. It is suggested that you contact an Elder Law attorney knowledgeable in Medicaid before making any transfers or purchasing any annuities.

Setting up a revocable or irrevocable trust is considered a transfer of assets by Medicaid. Before an individual can qualify for Medicaid, they will have to undue any revocable trusts. An irrevocable trust will be treated as a transfer of assets with a penalty period imposed. For this reason it is not advisable to spend money to set up a trust if you think there is any chance of a need for Medicaid long term care services in the future.

If an applicant for Medicaid has a joint bank account with a family member other than a spouse, all of the property is assumed to be the applicant's, unless contribution by all account holders is documented. Removing the name of a Medicaid applicant's name on any accounts in favor of another family member is considered a transfer of assets.

Examples of **non-exempt transfers** include:

- Changing title on property to a person other than a spouse without fair market value compensation.
- Giving away money as a gift to family members, friends, charity, etc.
- Changing ownership on life insurance policies to someone other than a spouse.
- Changing ownership on an automobile to someone other than a spouse

Transfer of a Home

Transfer of a home **without penalty** is allowed under the following circumstances:

- to a spouse
- to a child under 21 years of age, or of any age who is blind or permanently and totally disabled
- to a sibling who has resided in the home for at least one year immediately before the date the individual becomes institutionalized, **AND** provided care that allowed the individual to remain in the home.
- to a son or daughter of any age who was residing in the home for at least two years before the date the individual became institutionalized **AND** who was providing care that allowed the individual to remain in the home

In the last two instances, documentation must be submitted proving that the sibling's or child's sole residence was the home of the Medicaid applicant. The applicant's physician(s) or professional health provider(s) during the year or two years must substantiate in writing that the care was provided, **and that the care prevented the applicant from requiring placement in a nursing facility or assisted living situation. Documentation is required of the child or sibling that this was their sole place of residence, i.e. bank statements, bills, etc. with a date and the mailing address.**

Transfer of Property Between Spouses

There is no transfer penalty imposed when transfers occur between spouses. During the period of spend-down, it is advisable to take the Medicaid applicant's name off all resources, and put them in the community spouse's name only. The Medicaid spouse is allowed a bank account or other resources with a total value of only \$2,000 or less in his/her own name.

The applicant spouse is required to have his/her name removed from all bank accounts, stocks, bonds, CDs, life insurance policies, etc. These items can be put into the community spouse's name. It is not necessary to do this before making the application for Medicaid, but it must be completed within one year of the Medicaid approval date. The eligibility technician requires documentation of these changes once they have been made to insure continued Medicaid eligibility.

Life insurance change of ownership

If an applicant has a life insurance policy with over \$1,500 face value or over \$2,000 in cash value, it will have to be cashed in or ownership of the policy changed to the community spouse's

name. If there is a spouse, the policy may be retained by transferring ownership to the community spouse, but the cash value amount in the policy will be counted toward the allowed Community Spouse's Resources Allowance (\$109,560 in 2009). See Qualifications for Married Individuals.

Home ownership transfer

Since a transfer of property can be made between spouses without a penalty, the title to the house can be put in the community spouse's name, using a Special Warranty deed. The Medicaid spouse has to be able to sign over title, or the non-recipient spouse must have legal authority to do so with a Durable Power of Attorney, or Conservatorship. It is advisable to consult an elder law attorney knowledgeable in Medicaid to determine if a deed is needed and to discuss the timing of this transfer.

Reimbursement for Care

Family members who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services is considered as a transfer without fair consideration unless compensation is in accordance with the following:

- A family member may provide homemaking or caregiving services prior to the application for Medicaid and may be paid at the time of rendering the services for a reasonable hourly rate comparable to the prevailing market rate. It is suggested that there be a written contract as to what services are being provided and at what reimbursement rate.
- A written agreement should be executed prior to the delivery of services, stating what services and care is to be offered for what compensation.
- The agreement should be signed by the applicant, or a legally authorized representative, such as agent under a power of attorney, guardian, or conservator. The agreement should be dated and signature notarized if possible.
- Compensation for services rendered must be comparable to current market rates.

Right of Elective Share

Previously when the non-recipient put the house in his/her name only, they were advised to change their will, "disinheriting" the Medicaid recipient spouse. Colorado probate law allows a spouse who has been disinherited in the will to challenge the will to receive his/her "share" of the estate, which in most cases would be half of the estate.

The state of Colorado requires the Medicaid recipient to exercise this option to receive at least one-half of the community spouse's estate if the community spouse dies first. Medicaid benefits will be discontinued, assuming that these resources are available to the institutionalized spouse, putting him/her over the \$2,000 eligibility amount.

If a new will is made at least half the estate should be left to the institutionalized spouse. Medicaid eligibility can begin again, once these resources have been exhausted.

Prenuptial Agreements

Medicaid **does not** recognize prenuptial agreements. An assessment of the total value of the couple's resources shall be completed at the time of the Medicaid application. All non-exempt resources owned by a married couple are counted, whether owned jointly or individually. There are no exceptions for legal separation, pre-nuptial, or post-nuptial agreements. If any of these assets are transferred to other family members, the transfer penalty rule will be imposed.

Annuities

The new annuity provision still permits the use of non-balloon annuities, but requires in certain circumstances that the state be "named the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant." As always seniors need

to be aware that the State now views buying some annuities under certain conditions as transfers of property. This new rule will only make annuities more of a concern for someone going on Medicaid.

There are very specific rules about putting money into annuities before an individual applies for Medicaid. In some cases there is a transfer penalty imposed. Before putting any money into annuities, the family should consult an elder law attorney knowledgeable about Medicaid to determine what the ramifications will be. This holds true for putting a home into a life estate and trusts. There are penalty rules for these as well.

Deposits or Buy-Ins at Continuing Care Retirement Communities (CCRCs)

Any amount required for a deposit in a CCRC, or that are used for a Buy-In at CCRCs, will now be counted as an asset. In the past, CCRCs would require, say a \$50,000 buy-in for residence, but these funds would be held and returned to the person, or their beneficiaries, when the individual moved out or passed away. Under the new rule (Deficit Reduction Act of 2005 – **effective February 8, 2006**) these deposits will be seen as countable assets that need to be recouped and spent down before Medicaid eligibility.