

Medicaid Transfer Penalties

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*Medicaid Transfer Penalties
Seminar
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Association
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Medicaid Planning 101

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*Basic Medicaid Planning
Seminar*

Why Doesn't Everyone Do Medicaid Planning?

4 Main Reasons

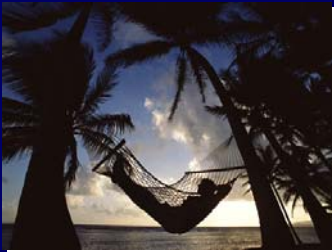


Reason # 1 - Denial

It could **NEVER** happen to me !



Reason # 2 - Procrastination



Reason # 3 - Lack of Knowledge

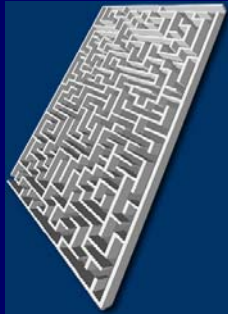


Reason # 4 – Striving to Relinquish Ownership and Control



Planning Involves Complex Issues

- ❖ Health Care Issues
- ❖ Financial Issues
- ❖ Legal Issues



Why Plan for Long Term Care?

- ⌘ Increased diagnosis of Alzheimer's Disease
- ⌘ May have a need for long term care in future
- ⌘ Want to Protect life savings
- ⌘ Plan or lose everything



Catastrophic Illness and Nursing Homes

- ⌘ Costs are rising
- ⌘ Average Nursing Home costs in North Alabama area are:
 - ☑ \$4,000 to \$6,500 per month or more!
- ⌘ How long can you pay before your life's savings are all gone?



Our Society Has Changed



- ⌘ Family may be spread out across the country
- ⌘ It's difficult caring for the aged
- ⌘ Children can't care for you ... and do you really want them to?

The Greatest Threat

- ⌘ The greatest threat to the financial security of middle-Americans is the cost of long term health care!



Long-Term Health Care Crisis



Health Care Roulette Wheel

- ⌘ Choose an illness
 - ☑ Lucky Green—You keep your wealth
 - ☑ Unlucky Red—You and your family go bankrupt
- ⌘ Step right up and spin the wheel

Have You Planned For Long-Term Care?



Failing to Plan Now
Is a Real Gamble

So What Are The Choices?

- ⌘ Do nothing
- ⌘ Rely on plan already in place

OR

- ⌘ Be Pro-Active
- ⌘ Develop a Legal Survival Plan for your loved one



Care Givers' Concerns

- ⌘ *Preserve Loved One's Health and Well-Being*
- ⌘ *Pay for the Cost of Long Term Care*
- ⌘ *Don't lose everything*

What is Medicaid?

- ☒ Created in 1965; 42 U.S.C §1396, *et seq.*
- ☒ Joint Federal-State Program
- ☒ Rules Vary From State to State
- ☒ A "Needs-Based" Program
- ☒ Not An "Entitlement" Program
- ☒ Funding: Approx.
 - 70% Federal
 - 30% Alabama

What is Medicaid?

- ☒ Designed to Provide Medical Assistance to Low-Income Persons Who Are:
 - ☒ Aged
 - ☒ Blind
 - ☒ Disabled
- ☒ Or, Who Are Members of Families With Dependent Children

What is Medicaid?

Described as:

- ☒ "Cooperative Federalism"
- ☒ *Harris v. McRae*, 448 U.S. 297, 308 (1980)

What is Medicaid?

Described as:

- ☒ "An aggravated assault on the English language, resistant to attempts to understand it."
- ☒ *Schweiker v. Gray Panthers*, 456 U.S. 34 (1981)

Medicaid Law; Federal

- 42 U.S.C §1396, *et seq.*
- 20 C.F.R. § 401, *et seq.*
- 42 C.F.R. §401, *et seq.*
- 42 C.F.R. § 430, *et seq.*

Medicaid Law; Alabama

- Section 22-6-1, *Ala. Code 1975*
- Rule 560-X-25-.01, *et seq.* (Eligibility), AMAAC
- Rules 560-X-33-.01, *et seq.* (Recoupments and Liens), AMAAC

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Medical Eligibility/Necessity
- Income
- Assets or Resources

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Medical Eligibility/Necessity
 - Institutionalization Must be Medically Necessary
 - Must Have Resided in Nursing Home for at Least 30 Complete and Consecutive Days

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Income
 - \$2094 or Less of Income
 - "Income" is Anything of Value an Individual/Couple Receives During a Month
 - Includes Part B Medicare Premium of \$99.90

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Assets or Resources
 - Countable Assets or Resources Valued at Less Than \$2000

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Assets or Resources
- Countable Assets or Resources Examples:
 - Cash
 - Checking, Savings, and Other Accounts
 - Promissory Notes, Loans, and Mortgages
 - Trusts (Some)
 - Stocks, Bonds, Mutual Funds
 - Annuities (Some)
 - Real Property (Some)
 - Life Insurance

Nursing Home Medicaid Eligibility

Three Tests Must Be Met:

- Assets or Resources
- Non-Countable Assets or Resources Examples:
 - ☒ One Motor vehicle
 - ☒ Life Insurance and Burial Funds (<\$5000)
 - ☒ Household Goods and Personal Effects
 - ☒ Burial Fund or Prepaid Burial Contract (<\$5000)
 - ☒ Burial Spaces
 - ☒ Real Property (Some)
 - ☒ Long-Term Care Insurance

Definitions

- Transfers
- Look-Back Date
- Penalty Amount
- Penalty Period of Ineligibility

"Transfers"

What is a "Transfer" Under Federal Law?

- A "transfer" that results in a period of ineligibility for Medicaid occurs when a Medicaid applicant, their spouse, or others acting on the individual's behalf "...disposes of assets for less than fair market value on or after the look-back date."
- 42 U.S.C. §1396p(c)(1)(A)

"Transfers"

What is a "Transfer" Under Alabama Law?

⌘ A "Transfer" is, and occurs at the time, when an individual or spouse (or a parent, guardian, court or administrative body, or anyone acting in place of or on behalf of or at the request or direction of the individual or spouse), by either affirmative act or failure to act, loses or relinquishes all rights of legal access to an asset or interest therein."

- AMAAC, Rule 560-X-25-.09(11)(a)

"Transfers"

What is a "Transfer"?

- A "Transfer" Also Includes a Failure to Act
 - e.g., Failure to Claim an Elective Share From Probate Estate of Deceased Spouse
- AMAAC, Rule 560-X-25-.09(11)(a) & (g)

"Look-Back Date"

⌘ "Look-back date" for an institutionalized individual is the date that is ... 60-months immediately prior to the later of the first day of the month of the original, initial application or the first day of the month that the individual becomes an institutionalized individual."

- AMAAC, Rule 560-X-25-.(11)(j)

"Look-Back Date"

- 60 Months/5 Years
- AMAAC, Rule 560-X-25-.(11)(j)
- 42 U.S.C. §1396p(c)(1)(B)

"Penalty Amount"

⌘ "The total, cumulative uncompensated value of the assets transferred on or after the look-back date will be divided by the average monthly cost to a private patient for nursing facility services in the state (at the time of application) as determined by Medicaid. This quotient, minus the fractional remainder, shall be the number of months the uncompensated value is counted. The fractional remainder shall be converted to a dollar figure and added to the individual's liability."

- AMAAC, Rule 560-X-25-.(7)(b)

"Penalty Amount"

- ⌘ Divide Amount of Gift by Penalty Divisor
- ⌘ \$5300 is Alabama's 2012 Penalty Divisor
- ☑ Changes Every January

"Penalty Period of Ineligibility"

⌘ "This penalty period shall begin the month of transfer, or the first month in which the individual is eligible for medical assistance under the State Plan and would otherwise be receiving institutional level care based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this Rule." (emphasis added.)

⌘ AMAAC, Rule 560-X-25-.(7)(b)

Exempt Transfers

- Are All Transfers Penalized?
- Are Some Transfers Exempt?

Exempt Transfers

- Transfers Between Spouses

Exempt Transfers

- Transfers Beyond the Look-Back Date

- AMAAC, Rule 560-X-25-.09(1)

Exempt Transfers

- Transfers of the Individual's Home to Certain Persons:
 - Spouse for Use as Their Residence

- AMAAC, Rule 560-X-25-.09(8)(a)1

Exempt Transfers

- Transfers of the Individual's Home to Certain Persons:
 - Child Who is Under Age 21 for Use as Their Residence

- AMAAC, Rule 560-X-25-.09(8)(a)1

Exempt Transfers

- Transfers of the Individual's Home to Certain Persons:
 - Child Who is Blind, or Permanently and Totally Disabled, for Use as Their Residence
- AMAAC, Rule 560-X-25-.09(8)(a)1

Exempt Transfers

- Transfers of the Individual's Home to Certain Persons:
 - ☑ A Sibling Who Has an Equity Interest in Such Home and Who Has Been Residing in the Home for a Period of at Least One Year Immediately Before the Date the Individual Becomes an Institutionalized Individual
- AMAAC, Rule 560-X-25-.09(8)(a)2

Exempt Transfers

- Transfers of the Individual's Home to Certain Persons:
 - ☑ A Son or Daughter Who Was Residing in the Home for a Period of at Least Two Years Immediately Before the Date the Individual Becomes an Institutionalized Individual, and Who (as Determined by Medicaid) Provided Care to Such Individual Which Permitted Such Individual to Reside at Home Rather Than in an Institution or Facility.
- AMAAC, Rule 560-X-25-.09(8)(a)3

Exempt Transfers

☒ The assets were transferred to (or to another for the sole benefit of) the individual's spouse or the individual's child who is blind or permanently and totally disabled. All funds transferred must be spent only for the benefit of the spouse or the child who is blind or permanently and totally disabled within a time frame actuarially commensurate with the life expectancy of the beneficiary.

☒ AMAAC, Rule 560-X-25-.09(8)(b)

Exempt Transfers

▪ A satisfactory showing is made to Medicaid that the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, or the assets were transferred exclusively for a purpose other than to qualify for Medicaid.

- Burden of Proof on Transferor
- AMAAC, Rule 560-X-25-.09(8)(c)

Exempt Transfers

⌘ All assets transferred on or after the look-back date for less than fair market value have been returned to the individual. A return of the assets may cause ineligibility based on excess resources.

⌘ AMAAC, Rule 560-X-25-.09(8)(f)

Exempt Transfers

- Medicaid determines that denial of eligibility would work an undue hardship.
 - If the Individual demonstrates by clear and convincing evidence that the imposition of such a penalty will cause the individual to suffer undue hardship.
- ☒ AMAAC, Rule 560-X-25-.09(8)(d) & (10)

Exempt Transfers

- ⌘ The assets were transferred to a trust which is determined to be exempt from consideration under §1917(d) of the Social Security Act.
- ☒ Income-Only Trust
 - ☒ 42 U.S.C. 1396p(d)(4)(A) Trust
 - ☒ 42 U.S.C. 1396p(d)(4)(B) Trust
 - ☒ 42 U.S.C. 1396p(d)(4)(C) Trust
- ⌘ AMAAC, Rule 560-X-25-.09(8)(e)

Exempt Transfers

- 42 U.S.C. 1396p(d)(4)(A) Trust
 - Under Age 65 Disability Trust
- Typical Use: Victim of Tort Recovery Under Age 65

Exempt Transfers

- 42 U.S.C. 1396p(d)(4)(B) Trust
- Miller Trust
- Qualified Income Trust (QIT)

- Typical Use: Excess Income Disqualifying From Medicaid Benefits

Exempt Transfers

- 42 U.S.C. 1396p(d)(4)(C) Trust
- Pooled Trust
- Alabama Family Trust
 - Section 38-9B-1, *et seq.*, Ala. Code 1975

- Typical Use: Over Age 65
 - New Federal Scrutiny; Possible Rule Change

Exempt Transfers

- Personal Service Agreements
 - Caution! Medicaid Carefully Scrutinizes Such Agreements

☒ AMAAC, Rule 560-X-25-.09(11)(k)

Exempt Transfers

- DRA-2005 Exceptions
- Certain Annuities
 - Irrevocable
 - Non-Assignable
 - "Actuarially Sound"
- Payments in Equal Amounts/No Balloon Payments
- State is Named as Primary Beneficiary to Extent of Payments Made by State, Unless There is a Spouse, Minor Child, Disabled Child, etc.
- AMAAC, Rule 560-X-25-.09(11)(g)1

Exempt Transfers

- DRA-2005 Exceptions
- Promissory Note, Loan, or Mortgage Under Certain Conditions
 - Payback Must Be "Actuarially Sound"
 - Payments in Equal Amounts/No Balloon Payments
 - Prohibits Cancellation of Balance Upon Death
- AMAAC, Rule 560-X-25-.09(11)(g)1

Exempt Transfers

- DRA-2005 Exceptions
- Purchase of a Life Estate in a Home
 - Purchaser Must Reside in Home for at Least One Year After the Date of Purchase
- AMAAC, Rule 560-X-25-.09(11)(g)1

Exempt Transfers

- Transfers to Testamentary Trusts
 - But Not Revocable Trusts
- HCFA Transmittal 64 §3259.1A1
- AMAAC, Rule 560-X-25-.09(11)(g)1

Exempt Transfers

- Post-Eligibility Transfers?
 - CMS Says *Wisconsin v. Blumer*, 534 U.S. 473 (2002), Allows States to Impose Transfer Penalties

Potholes and Landmines

- "Will you prepare a [Deed, Power of Attorney, Will, Trust, etc.] for my [Mother, Father, Grandparent, etc.]? They can't come in to see you because they are [sick, out of town, get carsick, etc.]

Potholes and Landmines

- If you do this, you may have
 - Blown the Client's Medicaid Eligibility
 - Increased the Capital Gains Taxes to be Paid
 - Assisted in a Fraud on an Elder Person
 - Assisted in a Fraudulent Transfer
 - Committed Malpractice
 - Receive a phone call from Tony McLain at ASB!

Thanks for Attending

Any Questions ?



Thanks for Attending

Please Complete the Feedback Form

The Actual Process

- ☑ Complete the Data Form and schedule an appointment to review your Data.
- ☑ The attorney will prepare a draft of your Living Trust for your review and approval.
- ☑ Upon your approval of the draft, the final copy of your Living Trust will be prepared for signing.
- ☑ Upon your Execution of your Personal Family Living Trust, your Estate Planning Team will assist you in the FUNDING of your Trust!
