

**PACAH
Spring Conference
April 20, 2010**

Medicaid Eligibility and Transfer Penalties

1

Presenter

John N. Kennedy, Esquire
KENNEDY, PC LAW OFFICES
P.O. Box 5100
Harrisburg, PA 17110-0100
Phone: (717) 233-7100
(877) 833-7100
Fax: (717) 233-7050
jkennedy@kennedypc.net
www.kennedypc.net

2

Outline

- Transfer Penalty Defined
- Administrative Steps
 - Undue Hardship Waiver and
 - Appeal of PA-162
- Litigations Steps
- Admission Agreements
- Recommendations

3



Transfer Penalties

Who?
What?
How?
When?
Where?

4

WHAT?

- DRA changes the start date of the period of ineligibility to the **LATER** of the first day of the month after the transfer occurred or the date on which the individual is otherwise eligible for MA and would be receiving institutionalized level care based on an approved application but for the penalty period.

5

WHAT?

- Applicant will be deemed eligible for Medicaid, but not eligible for payment until penalty period expires.
- Major impact is the start date of the penalty!

6



WHAT?

- CAO will perform a case review upon expiration of the penalty period and issue a new Notice to Applicant.

7

HOW?

- The period of ineligibility is calculated by dividing the total uncompensated value of all assets disposed on or after the look-back period by the average daily private pay rate in effect.
- Currently @ \$230.

8

HOW?

- Transfers totaling less than \$500 in any month will not be subject to the penalty.

9



HYPOTHESIS

- Anna admitted on September 1, 2009 and immediately applies for MA. Family produces all of the documents requested by the CAO. Anna had gifted away \$10,000 to one child in December 2006 and another \$10,000 to her other child in January 2007. She owned a house in her own name and had no other assets. She has social security income of \$1,500 per month.
- When will the penalty begin?
- How long will it last?

10

WHO?

Penalties apply to transfers made by:

- An applicant;
- An applicant's spouse; and
- A recipient.

11

HYPOTHESIS

- Anna applies for MA. Harold, her husband, transferred \$20,000 to their son during 2009.
- Do the DRA transfer rules apply?

12



HYPOTHESIS

- Richard, currently a recipient of MA at a SNF, owns his home with his wife Wilma. While at the SNF, Richard transfers his interest in the home to his son.
- Do the DRA transfer rules apply?

13

WHEN?

- Transfers occurring on or after February 8, 2006.

14

WHEN?

- DRA extends the 'look back' penalty period to 5 years for all transfers.
- Extension to 5 years not as big of an impact as the transfer penalty start date.

15



WHERE?

- Applies to nursing facilities, services equivalent to those provided in a nursing home, and home & community based services.

16

“Transfer” Expanded

- Notes, mortgages, liens
- Life estates
- Annuities

17

Notes, mortgages, liens

- The outstanding balance due on a note, loan, or mortgage will be treated as a transfer unless:
 1. Repayment terms must be actuarially sound;
 2. Payments in equal amounts through the term, no deferred payments and no balloon payments; and
 3. Balance cannot be cancelable upon death.

18



Life estates

- For applications filed after March 3, 2007, the purchase of a life estate in another person's home is considered a transfer for less than FMV unless the purchaser lived in the residence for at least one year after the date of purchase.

- Applies to purchases on or after February 8, 2006 if application was filed on or after March 3, 2007.

19

Annuities

- The purchase of an annuity by an applicant will be treated as a transfer for less than FMV unless:
 1. It is irrevocable and nonassignable.
 2. It is actuarially sound;
 3. Payments in equal amounts, no deferral or balloon payment.
 4. DPW must be a beneficiary.

20

Annuities

- The purchase of an annuity by an applicant's spouse will be treated as a transfer for less than FMV unless:
 - DPW is the primary beneficiary.

21

Gaps in MA Coverage and Payment

- Transfer Penalty:
 - Otherwise eligible for MA
 - Based on an approved application

22

Tools to Close the Gap

- Undue Hardship Waiver
- Appeal of the PA-162
- Discharge
- Breach of Contract against Resident
- Statutory Duty of Support
- Injunction Proceedings
- Guardianships
- Involvement of Criminal Authorities

23

Two Administrative Actions after a Transfer Penalty

- Undue Hardship Waiver

AND

- Appeal of the PA-162

24



Undue Hardship Waiver

- CAO will:
 - Apprise applicant he or she is eligible for Medicaid;
 - But not eligible for payment; and
 - Apprise the applicant of the undue hardship waiver procedures.

25

Undue Hardship Waiver

- Facilities can apply for the waiver with authorization of the individual or personal representative of the individual.
- DPW published a specific form.
- Sign upon admission?
- Revise admission agreement to give consent/authorization.

26

Undue Hardship Waiver

- Notice of waiver process contained in the Notice to Applicant (PA 162).
- Notice will contain all forms to be completed (A-D), including facility authorization.
- Waiver request and all documentation must be received by the CAO within 30 days of the Notice.

27



Undue Hardship Waiver

Process:

- Waiver request submitted to CAO.
- CAO caseworker makes a determination to grant, deny, or partially grant the waiver request.
- Caseworker's immediate supervisor reviews the determination.
- Supervisor's determination sent to 'headquarters' in Harrisburg (Bureau of Policy).

28

Undue Hardship Waiver

Process (cont'd)

- Bureau of Policy reviews and either approves or denies the CAO's decision.
- Bureau of Policy issues a decision.
- CAO issues a PA-162 consistent with the Bureau of Policy decision.
- Applicant will have the right to appeal.

29

Undue Hardship Waiver

DRA required states to establish undue hardship exception process if application of the penalty will:

- deprive an individual of medical care such that the individuals' health or life will be endangered, or
- the individual would be deprived of food, clothing, shelter, or other necessities of life.

30



Undue Hardship Waiver

Factors

- Age
- Health
- Financial situation of applicant
- Value of the asset transferred
- Amount of compensation received
- Date of asset transfer

31

Undue Hardship Waiver

Factors (cont'd)

- Any pattern of gifting
- Relationship of transferor to transferee
- Reasons why asset cannot be returned
- For home equity, reason the equity cannot be accessed

32

Undue Hardship Waiver

Special Consideration Factors:

- Sudden unexpected onset of a serious illness or disability occurred after the date of transfer
- Unexpected loss of other resources/income after the transfer occurred

33

Hypo

- Anna is deemed eligible for MA on October 1, 2009, but is not eligible for payment for approximately three months due to \$20,000 transferred to her children in December 2008. Anna had been gifting away \$10,000 per year to each of her two children for several years. Both her children used the gifts for necessities. In addition, Anna's admission to the facility was caused by a sudden stroke in August 2009.
- What are Anna's options?
- What are the facility's options?

34

HYP0

- Anna was admitted to the SNF in July 2005 with substantial resources. On Feb. 15, 2006, Anna transferred \$80,000 to her niece, Nellie, because Anna had no children of her own and Nellie was "like a child to her." At the time of the transfer, Anna had in excess of \$200,000 remaining in private resources and intended to discharge from the SNF in the near future. However, Anna's condition declined, causing her to remain at the SNF for several more years. After exhausting her private resources, Anna applied for MA benefits in September 2008. Meanwhile, Nellie used the \$80,000 to pay off personal bills and to start her own business, which eventually failed, forcing Nellie to file for bankruptcy protection under Chapter 13 in November 2008.
- When will the penalty period begin?
- What factors support an undue hardship waiver?

35

Waiver versus MA APPEAL

- Not the same process as the standard MA appeal of a denial.
- Must still use the appeal process if there is a disagreement, for example, regarding the value of the asset transferred or the calculation of the period of ineligibility.

36

Hypo

- Anna does not contest she transferred money to her son, but she claims the money was given to her son in exchange for the care he provided to her prior to her admission to the facility?
- What are Anna's options?
- What are the facility's options?

37

Hypo

- Anna transferred her house to her son in December 2008 in exchange for the son assuming the \$100,000 mortgage. The CAO believed the property was worth \$150,000 based on the assessed value and imputed a \$50,000 transfer penalty. Anna and the son disagreed with the value, arguing the house fell into disrepair after Anna moved into a personal care home. In addition, past tax bills were due and paid by the son.
- What are Anna's options?
- Son's options?
- Facility's options?

38

Discharge

- Same old story-right without a remedy?
- Is a discharge notice required in order to request an undue hardship waiver?

39

Parallel Proceedings

- Explore all other options available during the appeal and waiver process.

- Goal: Receive payment or obtain approval of the undue hardship waiver.

40

Parallel Proceedings

- CAO: What did the SNF do to get the transferred money back?

- First question is what CAN the SNF do to get the money back?

41

Non-Administrative Action

- Breach of Contract

- Fraudulent Transfer

- Statutory Duty of Support

- Injunctive Relief

- Guardianships

42



Breach of Contract

- Against resident: The problem is must be otherwise eligible for MA but for the transfer for the penalty to be triggered (i.e., no non-exempt assets and low income).
- Breach of Contract Against Responsible Party

43

Fraudulent Transfer

- Can be brought against the transferor and transferee.
- Standard: Transferor reasonably should have known he or she would incur debts beyond their ability to pay.
- One of the remedies: money transferred back to transferor.

44

Pennsylvania's Statutory Duty of Support

23 Pa.C.S. §4603



23 Pa.C.S. §4603 Relatives liability; procedure

...all of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge: (i) The spouse of the indigent person. (ii) A child of the indigent person. (iii) A parent of the indigent person.

46

Hypo

- Anna was admitted to the SNF and suffers from dementia. Upon review of Anna's bank records, it is evident Anna's son, Sal, who is also Anna's POA, was writing checks to himself and his business from Anna's bank account. The SNF filed an MA application on Anna's behalf which was approved with a \$45,000 penalty period due to the checks written to Sal and Sal's business.
- What steps can the SNF take?

47

Hypo

- Anna was admitted to the facility on March 1, 2010. After she was admitted to the SNF, Anna transferred her remaining \$10,000 to Sonny in April 2010, so his new bride can quit her job in a few months to stay at home with the newborn expected to arrive in 2008.
- What steps should or can the facility take?

48



Injunctive Relief

- Use to compel cooperation in the MA application, waiver, and appeal process.

- Keep the CAO and/or the BHA apprised of the status.

49

Admission Agreement Provisions

Duty to cooperate in the MA process.

- Contractually obligate the RP and resident to cooperate with the facility and the CAO in the MA eligibility process.
- Include the MA application process, any requests for information, waiver process, and any appeals of denial or discontinuance of MA.

50

Admission Agreement Provisions

- Authorization to Appeal a denial and authorization to request a waiver.

- Regulations do not allow the facility to do so unless there is authorization.
- Build authorization right into the Agreement.
- May want to use DPW's form authorization for the waiver.

51



Admission Agreement Provisions

Remedies for failure to cooperate.

- Breach of contract and damages.
- Specific performance of contractual obligations.

52

HYPO

▪ Anna was assessed a period of ineligibility due to a transfer. The SNF's Agreement provides consent for the waiver, so the SNF wants to file the request. Anna has difficulty with her finances. Her son/POA signed the Agreement as her Responsible Party. The son/POA refuses to cooperate in producing the documents necessary for the waiver process.

- What are the SNF's options?

53

HYPO

- Same facts, but what if son is not POA?
- Same facts, but son is not POA and did not sign the Agreement.

54

Guardianships

Types

- Guardian of the Person
- Guardian of the Estate
- Both

55

Guardianships

Interplay with Medicaid Eligibility Process

- If there is no one with authority, or willing, to access resident's assets or determine the specific facts regarding the transfer in question.

56

Criminal Authorities

- Reporting to local police, local District Attorney's office.
- Has been an increase in elder abuse sections of DA offices.
- Report to Attorney General's Office.

57

Guardianships

- Identify the need for someone to act on behalf of the resident for MA purposes as soon as possible and begin the guardianship proceedings.
- Focus on the timing of parallel proceedings: the MA application, waiver, and appeal process and the guardianship process.

58

Hypo

- Anna is admitted to the SNF on September 1, 2009 by her neighbor. Anna appears to be incompetent. The neighbor is not the POA, but did bring in Anna's most recent bank statements. Her statements show a series of significant checks written over the last several months, but there are no more details available.
- What are the SNF's options?

59

BHA Continuances

- Litigation options may take a considerable amount of time.
- Need to continue BHA hearings in order to create the best case for an undue hardship waiver and to preserve MA eligibility retroactive date.

60



BHA Hearings

- How to prepare for an appeal of the transfer penalty?
- How to prepare for the undue hardship waiver denial appeal?

61

BHA Hearings

- What do you do if you lose the hearing?
 - Petition for Reconsideration to the Secretary of DPW, and
 - Petition for Review to the Commonwealth Court of Pennsylvania

62

Recap: Steps to Take When Faced With Transfer Penalty

- Timely file Appeal AND Undue Hardship Waiver
- Consider what steps the SNF can take to recover the transferred funds
- Parallel Proceedings
- Continue BHA Hearing while the SNF takes action to recover the transferred funds
- BHA Hearing
- Petition for Reconsideration and Petition for Review (if necessary)
- Goal: The SNF recovers the transferred funds OR the Undue Hardship Waiver is approved

63

