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#### MISSION

The mission of Skelton Law Offices is to provide legal services of the highest quality, professionally, efficiently and compassionately, with the goal of preserving the independence, the dignity, and the emotional and financial security of older and disabled Mainers.

# ESTATE PLANNING & ELDER LAW NEWS

## The Tricky MaineCare Transfer Penalty

This article alerts elders, their loved ones, and their advisors to the potential pitfalls of the MaineCare<sup>1</sup> transfer penalty. When an application for MaineCare nursing home<sup>2</sup> benefits is filed, the applicant is asked whether the applicant or the applicant's spouse transferred any assets within the lookback period. If the answer is yes, the value and date of the transfers must be disclosed. Failure to do so in order to obtain Medicaid benefits is fraud which is a criminal offense.

Significant changes to federal Medicaid law regarding the transfer penalty were enacted in the Deficit Reduction Act of 2005 (DRA) which was effective on February 8, 2006. In response, each state was required to revise its Medicaid regulations to incorporate the changes. Maine's DHHS adopted new rules in April of 2007. To some extent, these rules are still being interpreted. The first few sections of this article outline the general rules, and the last few sections highlight traps that apply in particular circumstances.<sup>3</sup>

**1. Exempt Transfers.** There are certain transfers that are not penalized, including: transfers from one spouse to another spouse; certain transfers to or on behalf of dependent children and individuals with disabilities; and transfers of a primary residence to certain individuals, including caregiver children and siblings with equity interests.

All non-exempt transfers for which the individual received less than fair market value in return are assumed to have been made for the purpose of MaineCare eligibility. Although it is difficult to do, the individual can rebut the assumption with clear and convincing evidence that the transfer was made for reasons other than to gain eligibility for MaineCare.

**2. Lookback Period.** With the enactment of DRA in February of 2006, the lookback period has been increased from 36 months to 60 months. This change is being phased in. For all MaineCare applications filed through January of 2009, the lookback was only 36 months. Now the lookback is to February 8, 2006, or 60 months, whichever is shorter.

1. MaineCare is Maine's Medicaid program. It is a program funded through federal and state funds to provide medical assistance to individuals with limited resources. The MaineCare program is administered by the Maine Department of Health and Human Services (DHHS).

2. In 2002, DHHS promulgated regulations which imposed the transfer rules on applications for MaineCare benefits that pay for residential care facilities, assisted living facilities and boarding homes. In the last several weeks, DHHS has determined that federal law prohibits transfer penalties for these categories of MaineCare benefits. The MaineCare Program Manager is expected to issue emergency rules to that effect in the near future.

3. The legal information offered in this article is not intended to be legal advice. Consult an elder law attorney for the application of the Medicaid law, the MaineCare rules and local DHHS practice to your specific circumstances.

(Continued on next page)

This means that any transfer made today must be disclosed on an application for MaineCare nursing home benefits filed in the next five years.

**3. Calculation of the Transfer Penalty.** If a transfer is not exempt, a transfer penalty is calculated. The penalty is a period of ineligibility for MaineCare benefits for nursing home care. The penalty is calculated by dividing the fair market value of the transferred asset at the time of the transfer by “the average monthly private rate at the time of application for a semiprivate room in a nursing facility.” The transfer penalty divisor is currently \$7,258, and it is typically adjusted and increased every January 1st.

Example: Assume an individual transferred his camp to his child in April of 2006 and then applies for MaineCare nursing home benefits in July of 2009. DHHS would ask for the fair market value of the camp<sup>4</sup> at the time of the transfer. Then it would divide that value by \$7,258. Assuming the value of the camp was \$87,000, DHHS would impose a 12-month penalty ( $\$87,000 \div \$7,258 = 11.99$ ).

**4. Start Date of Transfer Penalty.** The most significant and problematic difference between the new transfer rules and those in place before February 8, 2006, is the start date of the transfer penalty. Pre-DRA, the transfer penalty started to run when the transfer was made. Post-DRA, the transfer penalty does not begin to run until DHHS determines that the individual is otherwise medically and financially eligible for MaineCare nursing home benefits, but for the penalty.

This means that the transfer penalty will only start to run when the individual has applied for MaineCare and has established that he is sick enough and poor enough to qualify. In the example offered above, where the camp was given to the child, if the individual applied for benefits in July and was found eligible for MaineCare benefits, the 12-month transfer penalty would start to run. But an individual is only eligible for MaineCare if he or she has less than \$10,000 in countable assets.<sup>5</sup> The individual would not have enough money to pay for his own care, yet he would not be able to receive MaineCare. Who would pay the nursing home bills?

Increasingly, elder law attorneys are helping families navigate the MaineCare rules when nursing home care is needed but there have been disqualifying transfers in the lookback period. Particularly if the individual who needs care still has some assets or there is a possibility of returning at least a portion of the transferred assets, there are legitimate strategies to “neutralize” the transfers and access MaineCare benefits.

**5. Caution: Disclaiming and Failing to Pursue the Elective Share Are Transfers.** The definition of transfers in the MaineCare rules specifically includes these two scenarios: (1) renunciation (i.e. disclaimer) of an inheritance and (2) failure by a surviving spouse to pursue a spousal elective share against the estate of the first spouse to die.

**6. Caution: Paying Family Members for Personal Care Can Be a Transfer.** If an individual pays family members for personal care in order to remain at home and then applies for MaineCare nursing home benefits within the next 60 months, the payments will be treated as gifts unless (1) there was a pre-existing, written, legally enforceable agreement for services between the individual and the caregiver (called a Personal Services Agreement in this firm); (2) the agreement recites the type, frequency, and duration of services, and the amount of consideration (money or property) being paid; and (3) at the time the services were provided, the individual’s physician signed a writing stating that the services were necessary to prevent the transfer of the individual to residential care or a nursing facility.

**7. Caution: There Is No Limit on the Transfer Penalty.** Although federal Medicaid law and local MaineCare rules contemplate a 5-year lookback, there is no limit on the length of a transfer penalty. Assume that an individual gave her oceanfront home to her children in July of 2006, and the fair market value of the home at the time of the transfer was \$900,000. If the individual applies for MaineCare benefits too soon, DHHS will deny the application and impose a penalty of approximately 10 years ( $\$900,000 \div$  then-current divisor). The children would likely be forced to access the equity in the property to pay for care. But what if there is insufficient equity because of a decrease in market values?

4. The MaineCare rules define fair market value as “an amount that can be expected to be received for selling a similar article on the open market in the geographic area involved.” But DHHS currently accepts the tax-assessed value of real estate, as increased, if necessary, by the state-certified factor, as evidence of the property’s fair market value.

5. Certain assets are not countable, including but not limited to: up to \$750,000 of equity in the primary residence located in Maine; household goods; an irrevocable mortgage trust; income-producing property; certain annuities and trusts; and \$8,000 in savings. In addition, the community spouse is allowed to have \$109,540 in countable assets. Additional savings are possible, especially for married applicants, by converting excess countable assets to non-countable assets.

**8. Caution: Medicaid Law and MaineCare Rules Change.** As evidenced by the 2006 changes to the federal law regarding Medicaid transfer penalties and by the very recent DHHS suspension of transfer penalties on applications for residential care, Medicaid law and the MaineCare rules change significantly and unexpectedly.

**9. Conclusion.** Elder law attorneys often discourage their clients from making premature transfers of money and property. While an elder is healthy and living independently, retained assets represent freedom of choice for the elder. And transfers to even the most trusted child expose the transferred assets to future liabilities like the child's bankruptcy or divorce. In addition, Medicaid law and the MaineCare rules are constantly changing. A transfer made today may be scrutinized under very different rules in the future.

The good news is that an elder law attorney can assist a client in navigating the maze of planning for long term care. There are legitimate strategies by which assets can be preserved even after a health care crisis has occurred and after an individual has moved to a nursing home.

### Prepare a Personal Property Memorandum to Distribute Special Items

Two recent movies highlight the importance of leaving instructions for disposition of tangible personal property after death. In *Gran Torino*, Clint Eastwood plays a bitter, bigoted Korean War veteran whose prize possession is his immaculately preserved 1972 Ford Gran Torino. To the chagrin of his greedy family members, he leaves the car to Thao, a fatherless Hmong teenager who early in the movie is pressured by a gang member to steal the car. In *Summer Hours*, a French movie released in the U.S. this month, three siblings deal with the emotions of distributing and disposing of valuable family possessions after the death of their mother.

Family disputes regarding the disposition of things like jewelry, heirlooms, artwork, antiques, furniture, and clothing can be very bitter – even when the tangible personal property in dispute has little monetary value.

A testator can make gifts of particular items for specific devisees in a Last Will and Testament. But Maine Probate Code also permits the use of a written statement or list separate from the Will. In this firm, we call that document the Personal Property Memorandum. It cannot be used to distribute money, real estate, evidence of indebtedness, documents of title, securities, or property used in a trade or business.

Requirements and recommendations for using a separate writing or instruction include:

1. The written instruction or list either must be in your handwriting or be signed by you. Your signature need not be witnessed, and notarization is not required.
2. The written instruction or list should clearly identify each item so that a particular item will not be confused with another.
3. You should identify clearly the beneficiary who is to receive each item by his or her proper name and relationship to you. It may also be helpful to include addresses and other contact information.
4. Although Maine law does not require that you date the writing, we recommend that you do so. In the event of two writings that conflict, the one with the more recent date would control.
5. Store your Personal Property Memorandum with your original Will in a place where it can be found.

You can revise or revoke your Personal Property Memorandum by adding or deleting gifts or by giving an item to a different devisee. Although Maine law indicates that the writing may be altered by you, we recommend that you prepare a new document and destroy the old one.

Lesson: Consider the opportunities to minimize family disagreements by making gifts of specific items to certain devisees in a Personal Property Memorandum.

## Joint Tenancy Accounts May Defeat a Testator's Intentions

In *Estate of Thelma M. Miller*, 2008 ME 176, the Maine Supreme Judicial Court considered whether bank accounts owned by a mother on her date of death became the property of one child or an asset of her estate to be divided among all her children under the terms of her will. The decision pointed to Maine law which provides that when a joint account with right of survivorship is left by a decedent, the “sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of a decedent unless there is clear and convincing evidence of a different intention at the time the account was created.” 18-A M.R.S. § 6-104(a). The Law Court decided that this evidence cannot be supplied by a subsequent will. The decision illustrates that it may be difficult to determine whether an account is joint or not. For attorneys, the Miller decision also includes a good discussion of the Improvident Transfer Act, 33 M.R.S. §§ 1021-1025.

Lesson: A will or trust may not control the disposition of all of an individual's assets upon death. An attorney experienced in estate planning will help clients review *all assets* - including jointly-owned accounts and real estate, assets with beneficiary designations (e.g. life insurance policies, annuities and retirement benefits), certain business interests, assets held in trust, etc. - to confirm that after death the assets will reach the people for whom they are intended.

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Disclaimer: We hope that you find the information in this newsletter to be helpful, but it is not the same as legal advice. A good estate plan or long-term care plan must take into account your individual circumstances and be sensitive to your personal goals and wishes.

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