THE TRICKY MAINECARE TRANSFER PENALTY

This article alerts elders, their loved ones, and their advisors to the potential pitfalls of the MaineCare transfer penalty. MaineCare is Maine's Medicaid program. When a person applies for MaineCare long-term care benefits (including benefits for nursing homes, residential care facilities, and nursing services in the home), the applicant must disclose whether the applicant or the applicant's spouse transferred any assets within the look-back period. If there have been transfers, then the applicant must disclose the value, date, and recipient of the transfers. Failure to do so is fraud, which is a criminal offense.

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 personal residence to certain individuals, including caregiver children and siblings with equity interests.

Non-exempt transfers for which the individual received less than fair market value in return are generally presumed to have been made for the purpose of MaineCare eligibility. The individual can attempt to rebut the presumption with clear and convincing evidence that the assets were transferred exclusively for a purpose other than to qualify for medical assistance.

Look-Back Period

When a person files an application for MaineCare long-term care benefits with the Department of Health and Human Services (DHHS), the applicant must answer questions about transactions within the so-called look-back period. The look-back period is sixty months, or five years, for nursing home care, residential care, and nursing services in the home. The applicant must disclose all transfers made during the sixty-month look-back period.

Calculation of the Transfer Penalty

If a transfer is not exempt, DHHS will impose a transfer penalty. The penalty is a period of ineligibility for MaineCare long-term care benefits. The penalty is calculated by dividing the fair market value of the transferred asset(s) at the time of the transfer "by the average monthly private rate for a semi-private room for a nursing facility at the time of application." The transfer penalty divisor is currently $8,476.

> *Example*: Assume an individual transferred his camp to his child in April 2015 and then applied for MaineCare long-term care benefits in April 2018. DHHS would ask for the fair market value of the camp as of April 2015. Then it would divide that value by $8,476. Assuming the value of the camp was $87,000, DHHS would impose a 10.3 month penalty ($87,000 ÷ $8,476 = 10.264). If the value of the camp was $200,000, DHHS would impose a 23.6 month penalty ($200,000 ÷ $8,476 = 23.596).

Start Date of Transfer Penalty

The transfer penalty does not begin to run until DHHS determines that the individual would otherwise be medically and financially eligible for MaineCare long-term care 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 or she is sick enough and poor enough to qualify. In the example offered above, where the applicant gave the camp to his child, if the individual applied for benefits in April 2018 and DHHS found him eligible for MaineCare benefits, the transfer penalty would start to run in April 2018. The individual would have to wait to receive MaineCare coverage for over ten months in the case of the $87,000 transfer and for almost two years assuming a $200,000 transfer. But that penalty could only run if he was otherwise eligible for MaineCare and had less than $10,000 in countable assets. He would not have enough money to pay for his own care, yet he would not be able to receive MaineCare. Who would pay his long-term care bills?

Elder law attorneys help families navigate the MaineCare rules when long-term care is needed but there have been disqualifying transfers in the look-back 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 in order to access MaineCare benefits.

Caution: Disclaiming an Inheritance or 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.

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 long-term care benefits within the next sixty months, the payments will be treated as gifts unless (1) there was a pre-existing written agreement for services between the applicant and the provider; (2) the agreement recites the type, frequency, and duration of the services and the amount of consideration (money or property) being paid; (3) the payment does not exceed the fair market value for those services (i.e., what area businesses would charge for the same services); and (4) 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.

Caution: There Is No Limit on the Transfer Penalty

Although federal Medicaid law and local MaineCare rules contemplate a five-year look-back period for most long-term care benefits, there is no limit on the length of a transfer penalty. Assume that an individual gave her oceanfront home to her children in April 2014, and the fair market value of the home at the time of the transfer was $600,000. If the individual applies for MaineCare benefits too soon (that is, within five years of the gift), DHHS will deny the application and impose a penalty. If the application was filed in 2018 while the divisor is $8,476, the transfer penalty would run for more than seventy months ($600,000 ÷ $8476 = 70.788), beginning in 2018, despite the fact that the transfer was made in 2014.

Caution: Medicaid Law and MaineCare Rules Change

Medicaid law and the MaineCare rules change significantly and unexpectedly, creating unanticipated consequences. It is important to consult an elder law attorney before taking any steps to transfer or preserve assets on your own.

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. Outright transfers to even the most trusted of children 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 a very different set of rules in the future.

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 a need for long-term care.

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Endnotes

1. The MaineCare rules define fair market value as the "[a]mount that can be expected to be received for selling a similar article on the open market in the geographic area involved." For real estate, DHHS currently accepts the tax-assessed value, as increased, if necessary, by the state-certified factor, as evidence of the property's fair market value.

2. In addition to the $10,000 ($2,000 asset limit and an additional $8,000 in savings), 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 mortuary trust of up to $12,000; income-producing property; and certain annuities and trusts. For nursing home care, if there is a community spouse, that spouse is allowed to have $126,420 (as of 2019) in countable assets. Additional savings are possible, especially for married applicants, by converting excess countable assets to non-countable assets.

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