The Five Year Look Back &

The Medicaid Application Assurance Plan

This booklet is provided by the Elder Law Firm of Zacharia Brown PC. Zacharia Brown is one of the oldest established Elder Law firms in western Pennsylvania having been practicing in this field since 1995. As you review this document you will learn how complex the field of Elder Law and especially Medicaid's Five Year Look Back can be. This is **NOT** a free booklet to help you do things on your own. Quite the opposite is true. It is intended to give you an understanding of this area and help make you aware of the issues so that you can help us to help you.

There is no attorney client relationship by virtue of this booklet. Everything discussed in this booklet is a fair representation of the law however it must be addressed only by an experienced, well versed elder law attorney. By continuing, you agree that we are not your lawyers by virtue of this booklet.

1. Introduction

Medicaid is without question, the largest payer of nursing home care expenses in the country. Approximately 99% of all nursing homes accept Medicaid. Those that do not are primarily wings in hospitals that are classified as nursing homes but are all short term. There are a few that do not accept Medicaid but those are quite rare. You cannot get Medicaid benefits in Pennsylvania for personal care homes nor assisted living nor memory care facilities. Medicaid is available only for skilled nursing facilities and two home care programs, one called the Aging or CHC Waiver program, the others are called LIFE programs.

When someone is on Medicaid for long term care, Medicaid pays for all their medical expenses. There are no co-pays, co-insurances, deductibles nor premiums. When in a nursing home, the resident pays their income to the nursing home (except for $45) and the rest is covered. To be complete, people may continue to carry their Medicare insurance and are able to deduct that from their income before paying their income to the nursing home. Then, if hospitalized, the Medicare coverage will cover whatever it covers, and Medicaid pays the difference. There is more to this topic, but it is beyond the scope of this booklet.

The biggest problem areas in applying for Medicaid are obtaining eligibility first, and then the Five Year Look Back (5YLB) which is the primary topic of this booklet. Many people who apply for Medicaid find it to be a traumatic experience. It does not have to be. What they did wrong is that the applied for a program for which they know nothing about and failed to have a plan going in. We call it a Medicaid Application Assurance Plan, or MAAP.

2. Medicaid Eligibility

To become eligible for Medicaid, the Applicant's assets must be at or under $2,400 for some people, $8,000 for others. The difference is based upon their income. In 2022, if your gross income is less than $2,523, you may keep $8,000. If more than that amount, you may keep $2,400.00. The home and one vehicle, and term or group life insurance are exempt from this determination. If the life insurance has cash value, that cash value is countable and goes into the calculation.

The home is a major issue when one applies for Medicaid. When all your income except that $45 is payable to the nursing home, that is not nearly enough to keep a home running with taxes, maintenance, utilities, insurance, and the like.

A major mistake people make is applying for Medicaid too soon and without having their application properly thought out and vetted. They apply without looking at their asset levels and without looking for problems that can confront them with the 5YLB. In my opinion, these mistakes are huge. If an applicant has $50,000 in the bank and applies for Medicaid, by the time they find out they are ineligible, say 4 months down the road, they now have a 4-month bill to the nursing home which might be about the same amount. If they need to pay taxes, pay off debts, pay for anything, it is too late. They must pay the nursing home.

A treatise the size of War and Peace could be written with short stories on what can go wrong with this. The most typical is that the Applicant has a home and, say $50,000 in the bank on June 1 and applies for Medicaid. The nursing home does not demand payment for June through September while Medicaid is pending. During this period, the family takes money from the bank account of the Applicant and pays for the taxes, utilities, insurance, and expenses on the home. In October, a determination is made that the applicant has what is termed excess resources, $42,000 more than the allowed amount. It is all based on the asset values on the date of application, or date of admission for a married couple. The nursing home states that their bill is $45,000 for that 4-month period so, they need only pay them $42,000 and Medicaid eligibility will occur. The problem is that the family spent $15,000 on taxes, utilities, etc. The Applicant no longer has that amount to pay. There is only $35,000 remaining.

3. Audit Period

The essence of the five-year lookback is that it is an audit period where the caseworker can review up to five years' worth of your financial history. You must supply bank statements, investment statements, deeds, purchases, etc. covering that five-year period.

You must be careful that you do not apply too early. There are timing issues. For example, if there was a transfer for say, $140,000. Maybe the house was transferred to a child on say January 1, 2018, and you apply for Medicaid in December of 2022, 59 months later. You will get a penalty of about 10 months. If you applied after January 1 of 2023, there would be no penalty. Be careful.

4. Transfers for less than Fair Market Value

The essence of the Medicaid statute provides:

If an applicant or the spouse of an applicant disposes of assets for less than fair market value on or after the lookback date, the individual is ineligible for nursing facility services (or home care services) during the period beginning on the first date the applicant would be otherwise eligible for Medicaid (assets or resources at the allowable amount and receiving care) and run for a period calculated by taking:

The total, cumulative uncompensated value of all assets transferred by the individual or the individual's spouse on or after the lookback date (the date which is five years prior), divided by the average monthly cost to a private patient in the State at the time of application.

The effect of this, is that if there are transfers for less than fair market value during this five-year period, Medicaid will not pay for the person's care for a period of time, the length of which is determined by the amount that was transferred.

Let's examine the pertinent parts:

a. Applicant or Spouse
b. Disposes of assets for less than fair market value
c. After the lookback date (prior five years)
d. The individual is ineligible for nursing facility services or home services
e. During the period beginning on the first date the applicant is otherwise eligible for Medicaid
f. And runs for a period calculated by taking
   i. The uncompensated value of all assets transferred divided by
   ii. the average monthly cost to a private patient in the State at the time of application (in Pa in 2022, $14,767.04 per month or $482.50 per day).

The key here is that it does not say gift or gives away. It uses a broader term, disposes. The title to the statute uses the term transfers.

Whether fair market value was received or not must be proved by the Applicant. The caseworker is permitted to presume that a transfer for less than fair market value was made unless the applicant can prove otherwise. Let's examine this in a little further detail.

Gifts

Gifts are generally when one person takes something of value and gives it to another getting nothing in return and expecting nothing in return, at least not for the same value. There are Christmas gifts, wedding gifts, charitable gifts, and donations of every sort. These all fall within the category of transfers for less than fair market value and will cause you a Medicaid penalty. However, there is an exception in Pennsylvania, if the total amount transferred for less than fair market value in one calendar month is $500 or less, it will be excluded. Please understand that this does not mean you can transfer $1,000 this month and skip next month. It does not work that way. Rather, to me it is like driving 5 miles over the speed limit. Most of the time if you're driving speed is 5 miles an hour or less above the allowed limit, you will not get a ticket.

There is no exemption from the penalty because the gift was made to a religious organization nor a charity. These too will be penalized.

Discounted Sales

A discounted sale is simply when one person sells something to another at a price that is less than fair market value. Clearly this is a transfer for less than fair market value, penalty causing category. This is a situation that occurs often. A parent decides that they want to sell some real estate or a vehicle to a child at a discounted price. It seems too often people think that the only good thing that causes Medicaid penalties and violates that five-year look-back. Understand, as this booklet attempts to explain, that the key is transfers for less than fair market value and not just gifts that will cause you a Medicaid penalty.

Adding a Name to the Title

If you add another person's name to the deed to your house, or some other property, the effect of that is giving that person an ownership interest in the property and causes the Medicaid penalty. This does not apply to adding your spouse's name to property nor for removing your spouse's name from property. All transfers between spouses are exempt from the Medicaid five-year look-back. This is primarily because all the assets owned by a married couple are considered no matter whose name is on them.

This is not the case if you add another person's name to a bank account. the entire value of the money in the bank account is countable and considered by Medicaid as being 100% owned by the applicant. On occasion we will come across a situation where a person who is not a nursing home resident and not applying for Medicaid has added a Medicaid applicant's name to a bank account of theirs. If that person can demonstrate clearly that all the money in that account is owned by the non-applicant, that belongs solely to the non-applicant, it should be considered exempt.

Undocumented transactions

Undocumented transactions are those situations that can best be described by example. A common one is when a child states that Mom gave child $1,000 every month to buy food and other necessities for her. They include a wide range of transactions of the sort. Even when mom lives with daughter, and the application shows payments for rent of say, $800 each month to daughter, unless that is documented with a rental agreement, in writing, it will cause you a Medicaid problem.

Cash Transactions

Also included are large cash withdrawals. A very common problematic issue is when there are caregivers who are paid in cash. The caseworker will notice large sums of cash coming out of the bank every week or month. There is immediate skepticism that this is an attempt to hide cash. Again, and I cannot state this strongly enough, the burden of proof is on the applicant, and the applicant must show with clearly documented evidence the fair market value was received. If you have a situation where there are caregivers who were paid in cash, an affidavit from those caregivers that they provided care in exchange for cash should work to eliminate the penalty.

Unknown Transactions

Unknown transactions include a couple of different situations. A very common one, is when the applicant has dementia and checks were written out in the past 5 years to persons or companies and the family does not know why these checks were written nor for what purpose. Another is when a parent has been secretly giving cash or checks to a child who is having difficulties. Parent has been careful not to tell the other children, and this is never learned about until that Medicaid application is being processed. You must be on the lookout for these, and this is another very good reason why the entire application should be vetted by a professional before it even gets submitted.

Burden of Proof is on the Applicant

As I have stated, the burden of proving that fair market value, or fair consideration as the case workers will often call it, was received is on the Applicant. Your word alone without documented verification, will not pass muster and they will issue the penalty.

5. The Process

A Medicaid application can be done by the submission of a form called a PA-600 L or using an online service called COMPASS. With that application you will need a lot of backup documentation. For purposes of the five-year look-back, the documentation that you will need includes:

- Five years' worth of bank statements for all bank accounts,
- Five years' worth of all investment statements for all investment accounts,
- Current life insurance policies which will show what the cash value is currently,
- Title to all vehicles that you own, these include boats, cars, trucks, and motorcycles,
- The deeds to all real estate that you have an ownership interest in,
- A listing of all closed accounts including a description of how the value of that account when closed was disposed of and where it went, and
- A listing of all transfers for less than fair market value.

Often, the caseworker will not require that you give them 5 years' worth of bank statements or 5 years' worth of investment account statements. What they will do sometimes is ask for the prior two years as well as the statement for January and June for the 3 years before those 2 years. If they come across any transfers that were not reported and described, they will then demand all 5 years. If you can get five years' worth of copies, please do so. If the bank or Investment Company charges a fee, and the applicant has excess funds, you may want to go ahead and pay for them to make it easier, especially if you were not going to be able to keep that money anyways.

IVS

There is something that the case workers used called IVS, which stands for income verification system. IVS Is simply access to the records of the applicant from both Pennsylvania's Department of Revenue as well as the Internal Revenue Service's records on the applicant. They will often find, for example, dividends paid, or interest paid on an account. If that account is not listed on the application, they will want to know all about it. Where did it come from, when was it closed, what it is worth, Etc. It is admittedly hard for some people, usually the children or close family members, to know all about the prior holdings of the applicant.

6. Penalty Imposed

A Medicaid ineligibility period is calculated by the caseworkers aggregating all the transfers in that prior 5 years that were for less than fair market value. They will take that total and divide it by $482.50, which is the average daily cost of nursing home care in Pennsylvania in the year 2022. This amount goes up each year.

So, for example, if they uncover $48,250 worth of transfers for less than fair market value, there will be a penalty for 100 days. This penalty begins when the applicant is otherwise eligible. otherwise, eligible means that the countable assets of the applicant is down to $2,400 or $8,000 dependent upon the level of income of the applicant.

7. Who Pays?

So, what happens next? It is the nursing home that goes unpaid. The state will issue approval (assuming the applicant is down to their asset level) with a penalty. They will give the start date of the penalty and the end date. You may think that that is just too bad for the nursing home, since clearly the applicant has no money and is therefore effectively judgment-proof, but that is not the case. They will and they do sue.

Filial Responsibility

In the state of Pennsylvania, along with many other states, there is a law called filial responsibility. This law provides that a nursing home can sue the spouse or parent or children of a Medicaid applicant for this gifted money. The realities are that the nursing home puts pressure on these family members to give the money back and cure the gifting penalty. Normally they will apply that pressure to the family members who were gifted the funds, but they are not limited to that person or persons. They can and do sue all the children and the spouse and the parents if there are any alive.

Now then, if all of this sounds frightening, please understand that there is much that can be done to minimize these problems. Far too many people do not understand what elder law attorneys do. We can cure these penalties by using the unspent funds of the applicant. There are a variety of strategies that are employed, and this is the province of elder law.

A Cure for the Problem – Medicaid Application Assurance Plan (MAAP)

Please try not to let the above deter you. There are two cures for these circumstances:

1. Any transfer made can be cured by giving the transferred amount back to the Applicant.
2. A Medicaid Application Assurance Plan (MAAP).

The first option is straight forward. If the person to whom the transferred amount can return it, or the value of it, the transfer penalty can be cured. This is not the best option.

The second option is MAAP. It was what Zacharia Brown does for most all its clients. With the assistance of our clients, we identify anything that might be considered a penalty causing transfer. Then with that amount and the value of the remaining unspent, spenddown assets, we run the numbers and convert some of the assets into income and the balance that remains is gifted. Here is a good example, and it is a true story.

We were approached by a new client whose parent was in a nursing home. This client was aware of the five-year look-back and informed me that 2 years ago the parent gave her 3 children $10,000 each. Back when this occurred the penalty was effectively nonpayment of Medicaid benefits for a period of one month for every $10,000 transferred or gifted away. The parent only had $75,000 left, and my client knew that her parents would be out of cash shortly and that that $30,000 that was gifted would cause a 3-month penalty. She explained that her and her siblings were working people and did not have the money to give back to their parent. I ran my analysis and informed her that with the remaining $75,000, we were going to prepay a funeral for $15,000, gift an additional $20,000, and used the balance to increase the parents' income during that penalty period so that the increase in income would pay through the penalty. The penalty period back then was 1 month of non-payment for every $10,000 transferred (it is $14,676 in 2022). So, the penalty period was now five months. We implemented that plan, used the remaining assets and recharacterized them as income, and it worked as expected. There was a five-month penalty and the income each month during that five-month penalty was almost enough to pay the monthly nursing home bill in full. A small shortfall was required to obtain Medicaid and that small shortfall was paid to the nursing home at the end of the five months from the additional gifted money of $20,000. The amount required was only about $1,000. Our client was overjoyed.

A MAAP is not just for curing prior transfers and gifts. A MAAP is also to protect other assets as well. As a rule of thumb, the use of a MAAP plan will preserve 50% of all of the assets owned by the Applicant.

MEDICAID APPLICATION ASSURANCE PLAN (MAAP)

The Key to this plan is to begin as soon as you know your loved one will be long term in the facility and before they have spent down all their assets. Under most plans, certain assets are converted to income to cover the cost of the penalty. By using this system, Elder Law attorneys can help you:

1. Cure prior transfers and

Have funds available to:

2. Protect against unknown transfers.
3. Have a family fund to help enhance the life of the nursing home resident; and
4. Help preserve the life savings of the nursing home resident.

The essence of MAP is that our staff will help to vet the application before it is submitted. We will go through the application as best we can and look for potential problems. By doing this, we can identify the problems early on and either address them or make you aware of the problems so that you can take the steps necessary to avoid most of the problems reviewed in this booklet.

In the example in the previous section, we had not only cured the previous $30,000 in transfers, but we also set aside an additional $20,000 to have the funds available in the event transfers were made that we all had been unaware of.

The Home Issue

Something we did not cover in the detail it deserves is the issue of the Family Home of the Applicant. The home is exempt when you apply for Medicaid. However, there are few funds available to cover the monthly costs of the home. Take for example a single person who is applying for Medicaid. If their assets are down to the home and $2,400/$8,000 and they are only permitted to keep $45 of their income each month, how does one pay the taxes, maintenance, utilities, and insurance? With MAP, a plan for the home is often included. There is a program called Home Maintenance Allowance that will allow the applicant to keep up to $800 each month for the first six months stay in the nursing home. This must often be requested yet many people are unaware of its existence. However, even after this six-month period, the Home Maintenance Allowance will end as well.

Some people believe that they will simply continue to maintain the home since it is exempt and believing that they will inherit it when the nursing home resident passes away. They then are often stunned to learn that the home is subject to the State's Estate Recovery Program, and they end up losing the home as well.

The home poses issues. However, there are several exemptions that allow the home to be transferred to a child of the resident. There are other methods detailed under a MAP that will allow funds of the resident to be used to transfer the home to the children. If there are enough funds available on the part of the nursing home resident or, if one of more of the children want to purchase the home at a great discount, a MAP can help.

Zacharia Brown Elder Law can be reached at (724) 942-6200 or visit:

PittsburghElderLaw.com