 BY MONICA J. FRANKLIN

What is the Difference Between the Medicaid Five-Year 'Look-Back' and a Medicaid Penalty Period?

Why should we be concerned about the look-back period or a Medicaid penalty? Given the staggering cost of long-term care in the nursing home, clients will often seek help from the family attorney to preserve the family home and other assets for children and grandchildren. Perhaps your client is a father who generously gave his children and grandchildren $50,000 during the past two years. Now that he is in the nursing home, the family is shocked to learn that he will not qualify for Medicaid for 10 months. In a panic they seek the help of their trusted attorney. They will rely upon your accurate advice and careful guidance regarding the Medicaid look-back period and the penalty period as they seek to manage the major crisis created by the good intentions of their now disabled father.

Effective March 1, 2015, the Bureau of TennCare increased the penalty divisor from $4,591 to $5,472.

In order to qualify for Medicaid to pay for long-term care, an unmarried applicant must have:

- Less than $2,000 in countable assets;
- Less than $2,199 in gross monthly income, or if his income exceeds that amount, we must create and establish a Qualified Income Trust; and he must
- Meet the medical eligibility criteria.

When an individual applies for Medicaid long-term care benefits, he must reveal any gifts or transfers for less than fair market value that occurred during the 60 months preceding the application. This 60-month period preceding the Medicaid application is called the "look-back" period.

If a Medicaid applicant has made a transfer during that five-year period, then he will incur a penalty period. That penalty period may exceed 60 months.

The *penalty period* is the length of time, following the Medicaid application date, during which the applicant will not qualify for Medicaid benefits. The penalty period is calculated by dividing the value of the transferred assets by $5,472, the Tennessee penalty divisor. Note that effective March 1, 2015, the Bureau of TennCare increased the penalty divisor from $4,591 to $5,472. Both Federal law and Tennessee regulations require that the penalty divisor be based upon the average cost of nursing home care in Tennessee. It is difficult to believe that $5,472 is the "average cost of nursing home care in Tennessee" when in Knox and surrounding counties, the cost of nursing home care is fast approaching $7,000 per month.

Bonnie is a widow, and because of her fragile health and its impact upon her functionality, she qualifies *medically* for Medicaid. This is good news, because qualifying medically for nursing home care these days can be a major hurdle, and sometimes requires an appeal. The bad news is that Bonnie does not qualify *financially* for nursing home care. Bonnie has $40,000 in countable, cash assets and she has less than $2,199 in gross monthly income. If Bonnie had more than $2,199 in gross monthly income, you would

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need to draft a Qualified Income Trust (QIT), and explain to Bonnie's Trustee how to administer the QIT.

Bonnie applies for Medicaid, and she reveals that she made a gift to her children of $20,000 during the two years preceding her Medicaid application. TennCare denies her application on the basis that she is "over-resourced." That means that she does not qualify for Medicaid because she has more than $2,000 in countable assets. Note that the TennCare denial is *not* based on the $20,000 gift. Without expert legal guidance, Bonnie "spends down" the rest of her money on nursing home care and reapplies for Medicaid. Bonnie still qualifies medically, her countable assets are below $2,000, and her income is below $2,199. It looks like she should now be approved for Medicaid benefits. Unfortunately, she will be denied again. The basis of this denial is that she transferred $20,000 during the 60 months preceding her second application.

When President George W. Bush signed the Deficit Reduction Act of 2005, several changes were made to the Medicaid rules. One of those changes is that a *penalty period* does not begin until the applicant is "otherwise eligible for Medicaid but for the transfer." Bonnie met the requirement of being "otherwise eligible" at the time of the second application. The penalty period is the number of months during which she will not receive Medicaid benefits to pay for her care. The penalty period is calculated by dividing the amount of the gift, $20,000, by the Tennessee penalty divisor $5,472. The penalty period is 5.5 months. This means her family must privately pay for her care or take her home for this length of time.

Note that if the monthly cost of care is $7,000, her family will pay $38,500 over a 5.5-month period to cure a gift of $20,000. The best thing for this family to do is scrape up $20,000, and give it back to Bonnie. That will cure the gift. Then, she still has to spend that amount down to $2,000. She could use several different tools in our elder law toolbox such as establishing a pooled trust to preserve funds for her benefit or purchasing a pre-paid funeral and burial or cremation plan. Bonnie's family could also seek competent legal advice to determine if the family could retain Bonnie's gift, trigger the penalty period, and use her remaining funds to pay for her care during the penalty period. She could also simply pay privately for her care. At the end of the 5.5-month period, Bonnie may apply for Medicaid, and she should be approved.

Giving away assets in later life, without the guidance of an experienced attorney, can create havoc in our clients' lives if they do need long-term care.

One other bump in the rough road to Medicaid is that a penalty period could actually exceed the 60-month look back period. This happens if the nursing home, family or a friend submits a Medicaid application too early. For example, over a six-year period, Clyde gave $500,000 to his children and grandchildren. Four years after the last gift was made, Clyde, suffering from dementia due to Alzheimer's disease, fell and broke his hip. After a hospitalization, he was released for rehabilitation at Sunny View Health and Rehabilitation. Clyde refused to participate in his therapy, mostly because he could not hear, understand or remember the instructions given to him by the physical therapist.

At this point, Clyde's assets are depleted. He has less than $2,000 in countable assets, less than $2,199 in gross monthly income, and he qualifies medically for nursing home care. However, his application is denied because he gave away $400,000 during the 60 months preceding the Medicaid application. The Bureau of TennCare sets the penalty period at 73 months. Obviously, the penalty period in this case far exceeds the "look-back" period of 60 months. How did Clyde get himself into this situation? First, he continued to give away his money until his funds were depleted. Those gifts were spread over several years. Second, he did not have a plan to pay for his long-term care.

Giving away assets in later life, without the guidance of an experienced attorney, can create havoc in our clients' lives if they do need long-term care. Rather than depend on the advice of neighbors and friends, clients need to hear that the bar can assist them in meeting their later life goals without jeopardizing the funding of their long-term care.

MONICA J. FRANKLIN is certified as a specialist in Elder Law by the National Elder Law Foundation. She has assembled a multi-disciplinary team to serve Tennessee's elderly and disabled clients through Life Care Planning Estate Planning. Contact her at Monica@TennElderLaw.com or www.TennElderLaw.com.

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