

Pennsylvania Association of Elder Law Attorneys 2022 Winter Meeting

SESSION 8 - ADVANCED DISCUSSION OF CURRENT ELDER LAW ISSUES

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QUESTION #1 - *Gifts and Nursing Home Admission Agreements? If gifts are allowed (understanding that there are penalties) are nursing homes allowed to prohibit it? (PA CODE §178.104)*

§ 178.104. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994.

(a) If assets are disposed of on or after July 30, 1994, § 178.105 and 178.106 (relating to presumption of disposition of assets to qualify for MA for transfers on or after July 30, 1994; and reestablishment of MA eligibility after transfers made on or after July 30, 1994) and this section apply to an institutionalized individual who is applying for or receiving MA for NFC as defined in § 178.2 (relating to definitions), including services in an ICF/MR, or a level of care in an institution equivalent to NFC, or home or community-based services furnished under a Title XIX waiver and the individual or the individual's spouse transfers assets for less than FMV.

(b) An institutionalized individual who disposes of assets for less than FMV on or after the look back date in subsection (c) is ineligible for MA for NFC which includes the services set forth in subsection (a). A transfer of assets by the community spouse to a person other than the institutionalized spouse is treated and affects the eligibility of the institutionalized spouse the same as a transfer by the institutionalized spouse.

(c) The look-back date shall be 36 months from the date on which the individual is both institutionalized and has applied for MA, except in the case of payments from a trust, or portions of a trust, as described in § 178.7(e)(1)(iii) and (2)(ii) (relating to treatment of trust amounts for all categories of MA for trusts established on or after July 30, 1994) which are considered assets disposed of for less than FMV by the individual. In this instance, the look-back date shall be 60 months.

(d) The number of months of ineligibility for the institutionalized individual who disposes of assets for less than FMV shall be equal to the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date divided by the average monthly cost to a private patient of NFC in effect in the Commonwealth at the time of application.

(e) An individual will not be ineligible for payment for NFC if:

(1) The assets were the resident property and title to the home was transferred to:

(i) The spouse of the individual.

(ii) The individual's child who is under 21 years of age, or blind or permanently and totally disabled as determined under § 140.81 (relating to deductions from earned income), or is blind or disabled based on SSI criteria as specified in 42 U.S.C.A. § 1382c(a)(3).

(iii) A sibling of the individual who has an equity interest in the home and who resided in the individual's home for at least 1 year immediately before the date the individual became an institutionalized individual.

(iv) A son or daughter of the individual, other than a child described in subparagraph (ii), who resided in the individual's home for at least 2 years immediately before the date the individual became an institutionalized individual and who provided care to the individual which permitted the individual to reside at home rather than in an institution or facility.

(2) The assets were transferred to one of the following:

(i) The individual's spouse or to another for the sole benefit of the individual's spouse.

(ii) To another for the sole benefit of the individual's spouse, from the individual's spouse.

(iii) The individual's child described in paragraph (1)(ii), or to a trust, including one described in § 178.7(f), established solely for the benefit of the individual's child.

(iv) A trust, including a trust described in § 178.7(f), established solely for the benefit of an individual under 65 years of age who is disabled based on SSI criteria as specified in 42 U.S.C.A. § 1382c(a)(3).

(3) The individual, the individual's spouse, or someone else acting on behalf of the individual can show that one of the following applies:

(i) The individual intended to dispose of the assets either at FMV or for other valuable consideration.

(ii) The assets were transferred exclusively for a purpose other than to qualify for MA.

(iii) The assets transferred for less than FMV were returned to the individual.

(4) The Commonwealth determines that denial of eligibility would cause undue hardship as defined in § 178.2.

(f) If an asset is held by an individual in common with other persons in joint tenancy, tenancy in common or a similar arrangement, the asset or the affected portion of the asset shall be considered to be transferred by the individual when an action is taken, either by the individual or by another person, that reduces or eliminates the individual's ownership or control of the asset.

(g) If a transfer by the individual's spouse results in a period of ineligibility for MA, the Commonwealth will apportion the period of ineligibility or any portion of the period between the individual and the individual's spouse if the spouse otherwise becomes eligible for MA for NFC.

(h) During the period of ineligibility for MA payment for NFC, the nursing facility or other provider may charge the private pay rate.

Authority

The provisions of this § 178.104 issued under sections 201(2) and 403(b) of the Public Welfare Code (62 P. S. § 201(2) and 403(b)).

Source

The provisions of this § 178.104 adopted December 23, 1994, effective December 24, 1994, and apply retroactively to July 30, 1994, 24 Pa.B. 6423.

Notes of Decisions

Burden of Proof

This regulation squarely places the burden on the applicant to establish that he or she "intended" to dispose of the assets for fair market value or for other valuable consideration, or that the assets were transferred "exclusively" for a purpose other than to qualify for Medical Assistance. *Ptashkin v. Department of Public Welfare*, 731 A.2d 238 (Pa. Cmwlth. 1999).

Disposition of Assets

The Department did not misapply the exception regarding disposition of assets; since at the time of the transfer the applicant and his spouse suffered ailments that could eventually render them in need of nursing home care, and when the only explanation for the transfer of real property to children for \$1.00 was to keep the property in the family, the Department determined that the petitioner had failed to satisfy his burden to show that the transfer was made for a purpose other than to qualify for Medical Assistance. *Godown v. Department of Public Welfare*, 813 A.2d 954 (Pa. Cmwlth. 2002).

Where a couple converts otherwise countable assets into an irrevocable, actuarially sound commercial annuity for the sole benefit of the community spouse, the annuity is not a countable resource in calculating the

CSRA. The transfer may not be used to impose a period of ineligibility. *Mertz v. Houston*, 155 F. Supp. 2d 415 (E.D. Pa. 2001).

Husband's use of funds transferred from his wife, who is a nursing home resident, to purchase an annuity from an irrevocable trust established by the couple's adult daughters was not a permissible spending down of the couple's money, where the purchase of the annuity was for less than fair consideration, was made with the intent to qualify the wife for Medical Assistance, and was contrary to the provisions and intent of the Medicare Catastrophic Coverage Act. *Bird v. Department of Public Welfare*, 731 A.2d 660 (Pa. Cmwlth. 1999).

Fair Consideration

The applicant failed to carry her burden of proving her eligibility for Medical Assistance by showing that the disputed funds were transferred for fair market value or exclusively for a purpose other than to qualify for Medical Assistance, where the applicant presented absolutely no evidence other than the promissory notes themselves, and where the Department of Public Welfare presented evidence that it had discovered that the applicant had sold her home and received net proceeds of \$28,815, but that she, instead of applying these funds for her nursing home care, transferred them to her adult children in exchange for two promissory notes, and that she is only receiving \$48 per month for 9 years until she receives the principal, plus accrued interest, in a lump sum due past her life expectancy. *Ptashkin v. Department of Public Welfare*, 731 A.2d 238 (Pa. Cmwlth. 1999).

Husband's use of money transferred from his wife, who is a nursing home resident, to purchase an annuity for \$143,000 that would, over a period of 6 years, should he live that long, reap a return of \$144,000, or \$600 in interest, but if he died before reaching the end of his purported life expectancy, his estate forfeits any further return on his investment, was not for fair consideration. *Bird v. Department of Public Welfare*, 731 A.2d 660 (Pa. Cmwlth. 1999).

Multiple Transfers

Where a Medicaid applicant made three consecutive transfers of \$9,000 each, the Department of Public Welfare correctly calculated the period of ineligibility by considering the total of the cumulative uncompensated value of the transferred assets instead of viewing each transfer separately. *Heffelfinger v. Department of Public Welfare*, 789 A.2d 349 (Pa. Cmwlth. 2001).

Cross References

This section cited in 55 Pa. Code § 178.5 (relating to treatment of irrevocable burial reserves for all categories of MA); 55 Pa. Code § 178.7 (relating to treatment of trust amounts for all categories of MA for trusts established on or after July 30, 1994); 55 Pa. Code § 178.105 (relating to presumption of disposition of assets to qualify for MA for transfers on or after July 30, 1994); 55 Pa. Code § 178.106 (relating to reestablishment of MA eligibility after transfers made on or after July 30, 1994); and 55 Pa. Code § 178.175 (relating to presumption of disposition of assets to qualify for MA for transfers on or after July 30, 1994).