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**TITLE 405 OFFICE OF THE SECRETARY OF  
FAMILY AND SOCIAL SERVICES**

**Proposed Rule**  
LSA Document #03-205

**DIGEST**

Amends 405 IAC 2-3-1.1 to specify that a Medicaid penalty period for the transfer of assets for less than fair market value will begin in the month after which assets have been transferred for less than fair market value; that if an individual is ineligible for medical assistance due to a transfer penalty, expenses for nursing home services incurred during the penalty period are not allowable medical expenses in calculating an individual's nursing home liability for any month of Medicaid eligibility; that in determining the total, cumulative uncompensated value of assets transferred, transfers made in consecutive months are added together; that the transfer of an asset that produces or is capable of producing income is a transfer of income as well as a transfer of the underlying resource and the values will be added together to determine the uncompensated value of the transfer; that for transfers of income-producing real property, \$6,000 of the equity value can be transferred without penalty if the transferred property produces at least \$360 a year in income; that, in order to establish that a transfer was made exclusively for purposes other than qualifying for medical assistance, the applicant or recipient must submit sufficient evidence to show that the transfer was made exclusively for reasons not related to Medicaid eligibility, estate recovery, or lien. Effective 30 days after filing with the secretary of state.

**405 IAC 2-3-1.1**

SECTION 1. 405 IAC 2-3-1.1 IS AMENDED TO READ AS FOLLOWS:

**405 IAC 2-3-1.1 Transfer of property; penalty**

**Authority:** IC 12-8-1-9; IC 12-8-6-5; IC 12-13-7-3; IC 12-15-1-10

**Affected:** IC 12-15-4; IC 12-15-5; IC 12-15-39.6

Sec. 1.1. (a) The following definitions apply throughout this section:

(1) "Assets" includes all income and resources of the applicant or recipient, and of the applicant's or recipient's spouse, including any income or resources ~~which~~ **that** the applicant or recipient or the applicant's or recipient's spouse is entitled to receive but does not receive because of action **by**:

(A) ~~by~~ the applicant or recipient or the applicant's or recipient's spouse;

(B) ~~by~~ a person, including, but not limited to, a court or administrative body with legal authority to act in place of or on behalf of the applicant or recipient or the applicant's or recipient's spouse; or

(C) ~~by~~ a person, including, but not limited to, a court or administrative body acting at the direction or upon the request of the applicant or recipient or the applicant's or recipient's spouse.

The term includes assets that an individual is entitled to receive but does not receive because of failure to take action subject to subsection ~~(i)~~ **(j)**.

(2) "Individual" means an applicant or recipient of Medicaid.

(3) "Institutionalized individual" means an applicant or recipient who is:

(A) an inpatient in a nursing facility;

(B) an inpatient in a medical institution for whom payment is made based on a level of care provided in a nursing facility; or

(C) ~~who is~~ receiving home and community-based waiver services.

(4) "Net income" means the income produced by real property after deducting allowable expenses of ownership. Allowable and nonallowable expenses are as follows:

(A) The following are allowable expenses of ownership if the owner is responsible for the expenses:

- (i) Property taxes.
- (ii) Interest payments.
- (iii) Repairs and maintenance.
- (iv) Advertising expenses.
- (v) Lawn care.
- (vi) Property insurance.
- (vii) Trash removal expenses.
- (viii) Snow removal expenses.
- (ix) Utilities.
- (x) Any other expenses of ownership allowed by the Supplemental Security Income program.

(B) The following are not allowable expenses of ownership:

- (i) Depreciation.
- (ii) Payments on mortgage principal.
- (iii) Personal expenses of the owner.
- (iv) Mortgage insurance.
- (v) Capital expenditures.

(5) “Noninstitutionalized individual” means an applicant or recipient receiving any of the services described in subsection (e).

(6) “Qualified long term care insurance policy” has the meaning **set forth** in 760 IAC 2-20-30.

(7) “Uncompensated value” means the difference between the fair market value of the asset and the value of the consideration received by the applicant or recipient in return for transferring the asset.

(b) A transfer of assets includes any cash, liquid asset, or property that is transferred, sold, given away, or otherwise disposed of as follows:

(1) Transfer includes any total or partial divestiture of control or access, including, but not limited to, any of the following:

- (A) Converting an asset from individual to joint ownership.
- (B) Relinquishing or limiting the applicant’s or recipient’s right to liquidate or sell the asset.
- (C) Disposing of a portion or a partial interest in the asset while retaining an interest.
- (D) Transferring the right to receive income or a stream of income, including, but not limited to, income produced by real property.
- (E) Renting or leasing real property.
- (F) Waiving the right to receive a distribution from a decedent’s estate, or failing to take action to receive a distribution that the individual is entitled to receive by law subject to subsection ~~(i)~~ (j).

(2) If an applicant or recipient relinquishes ownership or control over a portion of an asset, but retains ownership, control, or an interest in the remaining portion, the portion relinquished is considered transferred.

(3) A transfer of the applicant’s or recipient’s assets completed by the applicant’s or recipient’s power of attorney or legal guardian is considered a transfer by the applicant or recipient.

(4) For purposes of this section, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset, or the affected portion of the asset, shall be considered transferred by the applicant or recipient when any action is taken, either by the applicant or recipient or by any other person, that reduces or eliminates the applicant’s or recipient’s ownership or control of the asset.

(5) This section applies without regard to the exclusion of the home described in 42 U.S.C. 1382b(a)(1).

**(6) This section applies without regard to the exclusion of income-producing real property described in section 15 of this rule, except for property used in a trade or business, or real property for which the individual owns a government permit to engage in an income-producing activity. The transfer of income-producing real property other than property used in a trade or business or real property for which the individual owns a government permit to engage in an income-producing activity is subject to penalty under subsections (h) and (l). “Trade or business” means a trade or business that is actively managed or operated by the applicant or recipient.**

(c) If an applicant or recipient of Medicaid, or the spouse of an applicant or recipient, disposes of assets for less than fair market value on or after the look-back date specified in this subsection, the applicant or recipient is ineligible for

medical assistance for services described in subsections (d) through (e), for a period beginning on the first day of the first month ~~during or~~ after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this section. **If the transfer took place prior to July 1, 2003, the penalty period begins in the month of the transfer.** The ineligibility period is equal to the number of months specified in subsection ~~(f)~~ **(g)**. The look-back date is determined as follows:

(1) In the case of transfers that do not involve a trust, the look-back date is determined as follows:

(A) For an institutionalized individual, the look-back date is thirty-six (36) months before the first date as of which the individual both:

- (i) is an institutionalized individual; and
- (ii) has applied for medical assistance.

(B) For a noninstitutionalized individual, the look-back date is thirty-six (36) months before the later of **the date on which the individual:**

- (i) ~~the date on which the individual~~ applies for medical assistance; or
- (ii) ~~the date on which the individual~~ disposes of assets for less than fair market value.

(2) In the case of transfers ~~which that~~ involve payments from a trust or portions of a trust that are treated as assets disposed of by an applicant or recipient under section 22(b)(3) or 22(c)(2) of this rule, the look-back date is determined as follows:

(A) For an institutionalized individual, the look-back date is sixty (60) months before the first date as of which the individual both:

- (i) is an institutionalized individual; and
- (ii) has applied for medical assistance.

(B) For a noninstitutionalized individual, the look-back date is sixty (60) months before the later of **the date on which the individual:**

- (i) ~~the date on which the individual~~ applies for medical assistance; or
- (ii) ~~the date on which the individual~~ disposes of assets for less than fair market value.

(d) During the penalty period, an institutionalized individual is ineligible for medical assistance for the following services:

- (1) Nursing facility services.
- (2) A level of care in any institution equivalent to that of nursing facility services.
- (3) Home or community-based waiver services.

(e) During the penalty period, a noninstitutionalized individual is ineligible for the following services:

- (1) Home health care services.
- (2) Home and community care services for functionally disabled elderly individuals.
- (3) Personal care services as defined in 42 U.S.C. 1396a(a)(24).
- (4) Any other long term care services, including, but not limited to, the services listed in subsection (d).

**(f) If an individual is ineligible for medical assistance for services under this section, expenses for those services are not allowable medical expenses in calculating an individual's nursing home liability for any month of Medicaid eligibility.**

~~(f)~~ **(g)** The number of months of ineligibility shall be equal to the total, cumulative uncompensated value of all assets transferred by the individual, or the individual's spouse, on or after the look-back date specified in subsection (c), divided by the average monthly cost to a private patient of nursing facility services in the geographic area ~~which that~~ includes the county where the individual resides at the time of application. As used in this subsection, "geographic area" means the region identified in Section 2640.10.35.20 of the Family and Social Services Administration Program Policy Manual for Cash Assistance, Food Stamps, and Health Coverage. **For transfers taking place on or after July 1, 2003, in determining the total, cumulative uncompensated value of assets transferred, transfers made in consecutive months are added together. The penalty period begins with the month following the first month that the total amount transferred exceeds the monthly private pay rate.**

~~(g)~~ **(h)** This subsection applies to the transfer of a stream of income, including, but not limited to, the transfer of the income generated by income-producing real property ~~The transfer of income-producing real property is a transfer of a~~

~~stream of income if the transferor does not retain the right to receive the income generated by the property; or any other resource. When a transferred asset produces or is capable of producing income, the transfer of that asset is a transfer of income as well as a transfer of the underlying resource. The value of the income is added to the value of the underlying resource in determining the uncompensated value of the transfer.~~ The uncompensated value of income transferred is determined by calculating the greater of:

- (1) the fair market value; or
- (2) the actual amount;

of total net income that the property or other source of income is ~~expected to produce~~ **capable of producing** during the lifetime of the transferor, based on life expectancy tables published by the office, and subtracting the income, if any, that the transferor will receive from the property or other source of income after the transfer.

~~(h)~~ **(i)** When an individual accepts a rental payment that is less than the fair market rental value for income-producing property, the uncompensated value of the transfer is determined by:

- (1) calculating the difference between the fair market rental value and the amount of rent accepted; and
- (2) multiplying the difference by the person's life expectancy based on life expectancy tables published by the office.

~~(i)~~ **(j)** This subsection applies to a transfer of assets that results from failure to take action to receive assets to which one is entitled to receive by law. No penalty will be imposed if any of the following circumstances applies:

- (1) The applicant or recipient, or the individual with legal authority to act on behalf of the applicant or recipient, is unaware of his or her right to receive assets or becomes aware of the right to receive assets after the deadline for taking action has passed. If the office notifies the applicant or recipient of his or her right to receive assets prior to the deadline for taking action, the individual will be presumed to be aware of his or her right to receive assets unless subdivision (2) applies.
- (2) A physician states that the applicant or recipient is not capable of taking action to receive the assets, and there is no guardian or other individual with the authority to act on the applicant's or recipient's behalf.
- (3) The expenses of collecting the assets would exceed the value of the assets.
- (4) In the case of a surviving spouse who fails to take a statutory share of a deceased spouse's estate, no penalty will be imposed if the deceased spouse has made other equivalent arrangements to provide for a spouse's needs. "Other equivalent arrangements" includes, but is not limited to, a trust established for the benefit of the surviving spouse.

~~(j)~~ **(k)** An applicant or recipient shall not be ineligible for medical assistance under this section if any of the following apply:

- (1) The assets transferred were a home, and title to the home was transferred to any of the following persons:
  - (A) The spouse of the applicant or recipient.
  - (B) A child of the applicant or recipient who **is**:
    - (i) ~~is~~ under twenty-one (21) years of age; or
    - (ii) ~~is~~ blind or disabled as defined in 42 U.S.C. 1382c.
  - (C) A sibling of the applicant or recipient who has an equity interest in the home and who was residing in the applicant's or recipient's home for a period of at least one (1) year immediately before the date the applicant or recipient becomes an institutionalized individual.
  - (D) A son or daughter of the applicant or recipient, other than a child described in clause (B), who was residing in the applicant's or recipient's home for a period of at least two (2) years immediately before the date the applicant or recipient becomes an institutionalized individual and who the office determines has provided care to the applicant or recipient ~~which that~~ permitted the applicant or recipient to reside at home rather than in an institution or facility.
- (2) The assets were transferred to the applicant's or recipient's spouse or to another for the sole benefit of the applicant's or recipient's spouse.
- (3) The assets were transferred from the applicant's or recipient's spouse to another for the sole benefit of the applicant's or recipient's spouse.
- (4) The assets were transferred to:
  - (A) the applicant's or recipient's child who is disabled or blind as defined in 42 U.S.C. 1382c; or
  - (B) to a trust, including a trust described in section 22(i) of this rule, established solely for the benefit of the applicant's or recipient's child who is disabled or blind as defined in 42 U.S.C. 1382c.
- (5) The assets were transferred to a trust, including a trust described in section 22(i) of this rule, established solely for the benefit of an individual under sixty-five (65) years of age who is disabled as defined in 42 U.S.C. 1382c.

(6) The assets transferred are disregarded for eligibility purposes through the use of a qualified long term care insurance policy pursuant to under IC 12-15-39.6. If an asset is disregarded through the use of a qualified long term care insurance policy, that asset and any income generated by that asset may be transferred without penalty.

(7) A satisfactory showing is made to the office, in accordance with standards specified under 42 U.S.C. 1396p(c)(2)(C) by the Secretary of Health and Human Services, that:

(A) the applicant or recipient intended to dispose of the assets at fair market value or for other valuable consideration;

(B) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or

(C) all assets transferred for less than fair market value have been returned to the applicant or recipient.

**In order to establish that a transfer was made exclusively for purposes other than qualifying for medical assistance, the applicant or recipient must submit sufficient evidence to show that the transfer was made exclusively for reasons not related to Medicaid eligibility, estate recovery, or lien.**

(8) The office may waive the application of this section in cases of undue hardship, but only to the extent required by standards specified under 42 U.S.C. 1396p(c)(2)(D) by the Secretary of Health and Human Services.

**(l) For transfers of income-producing real property not used in a trade or business or the subject of a government permit for the owner to engage in income-producing activity, on and after July 1, 2003, six thousand dollars (\$6,000) of the equity value can be transferred without penalty if the transferred property produces an annual income of at least three hundred sixty dollars (\$360). If the equity value of the property is less than six thousand dollars (\$6,000), the property can be transferred without penalty if the property produces an annual income of at least six percent (6%) of the equity. This six thousand dollars (\$6,000) exemption is a single, one (1) time exemption that applies to the total value of all income-producing real property transferred by the applicant during the applicant's lifetime. If the property does not produce an annual income of at least six percent (6%) of the lesser of six thousand dollars (\$6,000) or the equity value, the entire equity is the uncompensated value.**

~~(k)~~ **(m)** In the case of a transfer by the spouse of an applicant or recipient which that results in a period of ineligibility for medical assistance, the office shall apportion the period of ineligibility, or any portion of that period, between the applicant or recipient and the applicant's or recipient's spouse, if the spouse otherwise becomes eligible for medical assistance, as specified in regulations promulgated under 42 U.S.C. 1396p(c)(4) by the Secretary of Health and Human Services. (*Office of the Secretary of Family and Social Services; 405 IAC 2-3-1.1; filed May 1, 1995, 10:45 a.m.: 18 IR 2223; errata filed Jun 9, 1995, 2:30 p.m.: 18 IR 2796; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; filed Mar 13, 2002, 10:09 a.m.: 25 IR 2472*)

### **Notice of Public Hearing**

*Under IC 4-22-2-24, notice is hereby given that on November 5, 2003 at 9:00 a.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room C, Indianapolis, Indiana the Office of the Secretary of Family and Social Services will hold a public hearing on a proposed amendment concerning Medicaid penalties for transfers of assets for less than fair market value. Copies of these rules are now on file at the Indiana Government Center-South, 402 West Washington Street, Room W451 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*

Pat Rios  
Secretary  
Office of the Secretary of Family and Social Services