

Document: Proposed Rule

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

Proposed Rule
LSA Document #01-206

DIGEST

Amends 405 IAC 2-3-1.1 to specify the method for calculating the Medicaid eligibility penalty for transferring income. Specifies that when the right to a stream of income is transferred for less than fair market value, the penalty is calculated based on the projected total income expected to be transferred during the individual's lifetime. Specifies that a transfer of income includes, but is not limited to, (1) transferring income-producing real property; and (2) accepting less than the fair market rental value when property is rented. Specifies that, for purposes of the Medicaid eligibility penalty for transferring assets for less than fair market value, "assets" includes any income or resources which the applicant or recipient or the applicant's or recipient's spouse is entitled to receive, but does not receive because of failure to take action to receive those assets. Repeals 405 IAC 2-3-1. Effective 30 days after filing with the secretary of state.

405 IAC 2-3-1
405 IAC 2-3-1.1

SECTION 1. 405 IAC 2-3-1.1, AS READOPTED AT 24 IR 3822, SECTION 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; 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 the applicant or recipient or the applicant's or recipient's spouse is entitled to receive but does not receive because of action:

(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.

(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.

(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.

~~(4)~~ **(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 in 760 IAC 2-20-30.

~~(5)~~ **(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 ~~which 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.

(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).

(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. The ineligibility period is equal to the number of months specified in subsection (f). 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:

(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 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:

- (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) 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 includes the county where the individual resides at the time of application. As used in this subsection, "geographic area" means the region identified in 405 IAC 1-4-2(o) [405 IAC 1-4-2 was repealed filed Sep 1, 1998, 3:25 p.m.: 22 IR 91].

(g) This subsection applies to the transfer of a stream of income, including, but not limited to, the transfer of income-producing real property. 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 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) 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.**

~~(g)~~ **(i) 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:
 - (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 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 IC 12-15-39.6. If an asset is disregarded through the use of a long term care insurance policy, that asset and any income generated by that asset may be transferred without penalty.

~~(6)~~ (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.

~~(7)~~ (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.

~~(h)~~ (j) In the case of a transfer by the spouse of an applicant or recipient which 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.

~~(i)~~ This section applies to transfers of assets made on or after August 11, 1993. Transfers of assets made prior to August 11, 1993, are governed by section ~~1(i)~~ of this rule: (*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*)

SECTION 2. 405 IAC 2-3-1 IS REPEALED.

Notice of Public Hearing

Under IC 4-22-2-24, notice is hereby given that on October 4, 2001 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 proposed amendments concerning Medicaid penalties for transferring 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.

John Hamilton
Secretary
Office of the Secretary of Family and Social Services