

# **PUBLIC BENEFIT CONSIDERATIONS**

*There are public assistance rules to keep in mind when planning for the future. There are rules against transferring assets in order to become resource-eligible for public assistance. There are rules that require some of those receiving assistance to reimburse the State for that assistance. An overview of these rules is presented in this section.*

- *Transfer of Assets*
- *Reimbursement of Public Assistance Payments*



## TRANSFER OF ASSETS

Each type of public assistance program has its own rules regarding the transfer of assets. Be sure that you know the rules specific to the type of public assistance that applies to your situation.

Federal and State law requires that if a person, or the person's spouse, disposes of assets for less than a fair market value within a specified period of time, the person becomes ineligible for public benefits for a period of time. The law allows certain asset transfers without penalty. These are important rules to be aware of.

New Hampshire applies the asset transfer law to applicants and recipients of Financial Assistance and some Medicaid-only services, HCBC and institutional services. As of January 2000, the Social Security Administration (SSA) also applies asset transfer rules to SSI eligibility.

### **WHAT IS AN ASSET AND WHOSE ASSET TRANSFERS MATTER?**

Under New Hampshire asset transfer rules, the term *assets* refers to income and resources. This includes income and resources that a person is entitled to but does not receive because of his or her own actions, such as, waiving a pension income, waiving the right to receive an inheritance, not accepting an injury settlement or diverting a settlement into a trust. This does not include the circumstances where a person cannot afford the cost of obtaining the asset or the cost to obtain the asset is greater than the asset value.

The assets of concern are the assets of the *individual* who applies for or receives State public assistance. When the term *individual* is used in regard to asset transfers, the term includes the person and:

- His or her spouse;
- Someone with the legal authority to act for the person or his or her spouse; or
- Someone acting under the direction of the person or his or her spouse.

The Social Security Administration (SSA) has yet to address in detail the asset transfer provisions for SSI applicants and recipients. The SSI law became effective in January of 2000.

## ***WHAT ARE ASSET TRANSFERS?***

Listed below are examples of asset transfers that the State would look at for Financial Assistance applicants and recipients or Medicaid-only HCBC or institutionalized applicants and recipients.

### **ASSET TRANSFERS – N.H. FINANCIAL ASSISTANCE & MEDICAID**

- Title or ownership of an asset passes from the individual to another person.
- The individual gives another person access to assets through joint ownership.
- The individual completes a document to transfer an asset (including title) at a future date and delivers the document to the person who will receive the asset.
- The individual acts to reduce or eliminate the individual's ownership or control of an asset.
- The individual gives another person access to an asset through joint ownership and the individual or another acts to reduce or eliminate the individual's ownership of the asset.
- The individual transfers title or ownership of an otherwise excluded home to another person/entity, including a home which has become income-producing.
- The individual places assets into an irrevocable trust or similar legal device, including an annuity.
- The individual obtains a reverse mortgage, home equity conversion mortgage, or similar loan on an otherwise excluded home or other real property and transfers the proceeds to another person.
- The individual converts a countable asset.
- The individual is entitled to an asset but does not receive the asset because of action:
  - By the individual or the individual's spouse;
  - By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
  - By any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

Some asset transfers are allowable. Transfers that are allowable under NH Medicaid and SSI law are listed on the following page.

## **ALLOWABLE ASSET TRANSFERS**

*Applicable to: Medicaid-only HCBC and institutionalized applicants/recipients  
and  
SSI applicants/recipients*

Transfer of home and title from an institutionalized individual to:

- Spouse,
- Child under age 21,
- Child who is blind or permanently and totally disabled,
- Child who meets all of the following:
  - Over age 21,
  - Not blind or permanently and totally disabled,
  - Resided in the home for at least 2 years immediately before the individual's institutionalization, and
  - Provided care to the individual so as to permit the individual to reside at home rather than in an institution.
- A sibling who:
  - Has an equity interest in the home, and
  - Resided in the home for at least 1 year immediately before the individual's institutionalization.

Asset transfer:

- To the spouse or to another person solely for the benefit of the spouse;
- From the spouse to another for the sole benefit of the spouse;
- To a child who is blind or permanently and totally disabled or to a trust established solely for the benefit of such a child (including the self-settled special needs trust); or
- To a trust established solely for the benefit of an individual less than 65 years of age who is disabled (including the self-settled special needs trust).

Asset transfer in which a satisfactory showing is made to the State that:

- The individual intended to dispose of the assets for fair market value or other valuable consideration;
- The exclusive purpose of the asset transfer was other than to qualify for assistance benefits; or
- All assets transferred for less than fair market value have been returned to the individual; or
- The eligibility penalty for the asset transfer would result in an undue hardship for an institutionalized individual.

### ***WHAT IS A TRANSFER FOR FAIR MARKET VALUE?***

For New Hampshire Financial Assistance applicants and recipients and Medicaid-only: HCBC or institutionalized applicants or recipients, the following definitions of *fair market value* is used.

*Fair market value* is an estimate of the prevailing price of the asset at the time that it was transferred. New Hampshire describes the value simply as “the price at which a willing seller and a willing buyer will trade.”

For an asset transfer to be classified as a transfer for fair market value, a person must receive compensation with real value. A transfer for love or similar reasons is not considered a transfer for fair market value. A transfer to a relative as compensation for care provided in the past is not a transfer for fair market value unless the person can show that there was an agreement for this at the time that the relative provided care.

### ***WHAT IS THE LOOK-BACK PERIOD?***

Under the law, for applicants and recipients of Financial Assistance and Medicaid-only HCBC or institutional care, the State will look at any asset transfers made during a *look-back period* of 36 months or 60 months. The State will also look at transfers made while an assistance application is pending or transfers made while an individual is receiving assistance.

Under the Medicaid program, the look-back period begins on the date that a person is both institutionalized (or begins receiving HCBC services) and has applied for Medicaid. Under the Financial Assistance program, New Hampshire begins the look-back period on the date of application.

Generally, the look-back period for a transfer of assets is 36 months. When the asset transfer involves payment from a trust or assets disposed of through a trust, the look-back period is 60 months. Assets disposed of through a trust include: (1) payments made from a revocable trust that are not to or for the person; and (2) establishment of an irrevocable trust from which no payment may be made to the person. (For further discussion on the trust asset, see the section *The Special Needs Trust*.)

For SSI applicants and recipients, the look-back period for a transfer of assets under the SSI program is 36 months regardless of whether or not the transfer involves a trust. The look back begins on the date of application, although a transfer occurring after the date of application will also be examined.

A **revocable trust** is a trust which can be revoked or cancelled by the creator of the trust. This includes trusts that are called irrevocable but which will terminate if some action is taken by the grantor.

An **irrevocable trust** is a trust which cannot in any way be revoked or cancelled by the creator of the trust.

### ***WHAT IS THE PERIOD OF INELIGIBILITY?***

A Financial Assistance applicant or recipient who transferred assets for less than fair market value within a look-period or after, becomes ineligible for Financial Assistance for a period of time. The person is ineligible for financial assistance for:

- 60 months from the date of transfer of an asset to an irrevocable trust; and
- 36 months from the date of all other asset transfers.

A Medicaid-only HCBC or institutionalized applicant or recipient who transfers assets for less than fair market value within the look-period or after becomes ineligible for certain services provided under the Medicaid program. The person becomes ineligible for nursing facility and similar services, as well as HCBC services.

The State calculates the period of ineligibility by the following formula:

$$\frac{\text{Uncompensated value of assets} + \text{average monthly nursing facility private pay rate}}{\text{Number of months of ineligibility}} =$$

The period of ineligibility begins on the first day of the month in which the person transferred the asset. The period is unlimited and runs continuously. When two or more penalty periods overlap, the State imposes the penalties sequentially.

The SSI applicant or recipient who transfers assets for less than fair market value within the look-period or after, becomes ineligible for SSI benefits for a prescribed period of time. The SSA calculates the period of ineligibility in the following manner:

$$\frac{\text{Uncompensated value of assets} + \text{Maximum monthly benefit payable}}{\text{Number of months of ineligibility}} =$$

The penalty period may not be longer than 36 months.

### ***HOW IS DISPOSAL OF PROPERTY BY A SPOUSE TREATED?***

For Medicaid-only HCBC or institutionalized applicants and recipients and SSI applicants and recipients, when a spouse disposes of a person's assets, the penalty may be divided between the person and the spouse.

## REIMBURSEMENT OF PUBLIC ASSISTANCE PAYMENTS

Many people who receive public assistance must reimburse the State for payments that the State made on their behalf under Financial Assistance programs or under the Medicaid program. New Hampshire usually recovers these payments from the person's estate, after the death of the person, although there are circumstances where the State may recover earlier. The State may also recover the cost of assistance payments from judgments or settlements that a person receives from other parties who are liable for the cost of the person's care.

### REIMBURSEMENT THROUGH ESTATE RECOVERY

#### *WHAT CIRCUMSTANCES REQUIRE REIMBURSEMENT?*

Federal law requires that the State recover certain Medicaid payments that it made for a person. Federal law restricts recovery to the recovery of payments made to those listed in the table below ("Recovery from"). Also, the State may only recover under certain circumstances ("Recovery restricted to").

RECOVERY OF MEDICAID PAYMENTS	
Recovery from:	Recovery restricted to:
Individual who is: <ul style="list-style-type: none"><li>• Institutionalized; and</li><li>• Is not reasonably expected to be discharged and return home.</li></ul>	The individual's estate or the sale of the property that is subject to a lien.
Individual who was 55 years of age or older when receiving Medicaid.	Medicaid payments for: <ul style="list-style-type: none"><li>• Nursing facility services,</li><li>• Home and community-based services, and</li><li>• Related hospital and prescription drug services.</li></ul>

New Hampshire also requires reimbursement from certain people who receive Financial Assistance. In summary, New Hampshire requires the following people to reimburse the State for assistance payments:

- OAA Financial or Medicaid recipients;
- APTD Financial Assistance recipients;
- APTD Medicaid recipients who are age 55 or older;
- QMB, QDWI, SLMB, SLMB135 or SLMB175 who are age 55 or older; and
- Medicaid recipients who own real estate and who are permanently institutionalized.

## ***WHEN DOES THE STATE RECOVER?***

The State typically recovers assistance payments from the person's estate, after his or her death, but may do so earlier under some circumstances. The State may recover Financial Assistance payments from the estate of the person or the estate of his or her spouse. The State may recover Medicaid payments after the death of the person, both from his or her estate, and from a revocable trust of the person.

### ***For the Person Who Received Financial Assistance—***

New Hampshire law prohibits recovery of financial assistance prior to the death of the person and prohibits recovery of a home while a surviving spouse occupies the house.

### ***For the Individual Who Received Medicaid—***

Under federal and State law, the State may only recover Medicaid payments after the death of the person's spouse, if any, and when there is no surviving child under 21 years of age or a child that is blind or disabled. When the State has imposed a lien on the home of an institutionalized person, the State may not recover while the people listed below reside in the home and have done so continuously since the institutionalization of the person.

- A sibling who was living in the person's home for at least one year immediately before the date of the person's admission to the institution; or
- A son or daughter who was residing in the person's home for at least two years immediately before the date of the person's admission to the institution, and who establishes that he or she provided care to the person which permitted the person to reside at home rather than in an institution.

### ***Undue Hardship Waiver --***

Under federal and State law, the State may waive recovery in a case of undue hardship or when recovery would not be cost-effective.

## **STATE LIENS ON A PERSON'S PROPERTY**

To recover the amount of Financial Assistance paid by the State, New Hampshire imposes a lien against the real estate (home or land) of the person or his or her spouse. The State places the lien on the property during the lifetime of the person and collects on the lien at the death of the person or spouse.

To recover the amount of Medicaid paid by the State, New Hampshire will usually impose a lien only upon the death of the person. Federal and State Medicaid law allows the State to impose a lien against property prior to the death of a person in only two circumstances:

1. When ordered by a court in order to recover assistance benefits that were incorrectly paid to the person; or
2. Against real property when a person:
  - Is institutionalized, and
  - Is not reasonably expected to be discharged and return home.

In the second circumstance, federal and State Medicaid law imposes two conditions. First, the State may not impose a lien on the home of the person if any of the following are residing in the home:

- The person's spouse;
- The person's child, if the child is under 21 years of age, blind or disabled; or
- The person's sibling, if the sibling has an equity interest in the home and resided in the home for at least one year immediately before the person's institutionalization.

Second, the lien must dissolve if the person is discharged from the institution and returns home.

### **STATE RECOVERY OF AN INDIVIDUAL'S SETTLEMENT OR JUDGMENT**

Federal law requires the State to take all reasonable measures to determine the legal liability of others (third parties) for a person's medical costs. By law, the Medicaid program is the payor of last resort. When another party is legally liable, the State must seek reimbursement from that party for Medicaid payments that the State made on behalf of a person.

Federal law also requires that the Medicaid applicant assign to the State any rights that the person has to support and to payment for medical care from a third party. By State law, when a person *accepts* public assistance, he or she *automatically* makes this assignment. Therefore, if *after* a person becomes eligible for Medicaid, he or she receives a court judgment or settlement, the State may claim those funds. The State may claim the amount it has paid on behalf of the person under Medicaid. (See also *Treatment of the Judgment or Settlement* in the discussion of *The Self-Settled Special Needs Trust* in the section *The Special Needs Trusts*.)