



Policy Memo	
KDHE-DHCF POLICY NO: 2020-06-01	From: Erin Kelley, Senior Manager
Date: June 26, 2020	Medical KEESM Reference: 5721.10
RE: Transfer of Property (TOP) Penalty Cure	Program(s): Long Term Care Medical Assistance Programs

This memo sets forth instructions for policy changes being implemented in June 2020 regarding changes to the transfer of property (TOP) penalty cure policy. Unless otherwise indicated, this policy shall be effective with the issuance of this memo. Revisions to the Medical KEESM manual will be made with in July 2020 revision. Additional information related to the implementation of these changes is available through training material released to eligibility staff.

I. BACKGROUND

A transfer of property (TOP) penalty imposed due to an uncompensated transfer may be cured (in whole or in part) when the property is returned to the individual who transferred the property. The timing and value of the returned property determine how the transfer penalty is modified.

A. CURRENT POLICY

The following explains the current policy and the difference between a full and a partial cure.

1. FULL CURE – TOP VOIDED

A full cure of the TOP occurs where all property (or the fair market equivalent value) has been returned to the individual who transferred the property. In that instance, the TOP penalty is voided. The returned property is considered available continuously back to the date of the original transfer through the month the property was returned. Eligibility for long term care coverage may be redetermined based on the value and/or exempt/countable status of the returned property.

2. PARTIAL CURE – TOP MODIFIED

A partial cure of the TOP occurs where some, but not all, of the property (or the fair market equivalent value) has been returned to the individual who transferred the property. In that instance, the TOP penalty is not voided, but instead modified. The returned property is again considered available continuously back to the date of the original transfer through the month the property was returned.

A new modified TOP penalty is not applied unless and until the individual is otherwise eligible (including resource eligible) for long term care coverage. Assuming the returned property is resource-disqualifying, this means that the modified penalty will not be imposed (if at all) until the countable resources are less than or equal to the \$2,000 allowable resource limit. Therefore, unless the returned property is an exempt resource, or of such nominal value there is immediate resource eligibility, a modified penalty period will always commence on a date sometime after the start date of the original transfer penalty.

B. UNINTENDED CONSEQUENCES

There is one exceptionally concerning unintended consequence of the current TOP cure policy. When the TOP is partially cured, and a modified TOP is applied because the individual is otherwise eligible for payment of long term care services, the new modified penalty period may very well extend beyond the original TOP penalty end date. To that affect, a partial return of property has actually extended the transfer penalty period rather than shortened it.

This occurs because the new modified transfer penalty cannot start until the individual is otherwise eligible for payment of long term care services. By counting the returned property as available back to the date of the original transfer through to the date returned (and thereafter if not immediately expended on exempt resources or services), in most instances there will be no resource eligibility until sometime after the original transfer penalty start date. By floating the penalty period forward in this manner, even a shorter modified penalty period may extend beyond the original transfer penalty period end date since it begins later than the original transfer penalty period start date.

The reason for counting the returned property as available back to the date of the original transfer is rather complex but in simple terms is intended to prevent the gifting and subsequent return of property as an effective mechanism to inappropriately shelter additional property from the Medicaid resource spend down process.

C. ADDITIONAL GUIDANCE NEEDED

In addition to the unintended consequences mentioned above, guidance to eligibility staff concerning several issues in administering the current TOP penalty cure process has never been adequately provided. Those include the timing of the cure, whether a new application

is required, and how returned property is treated if it has increased or decreased in value. Those issues will be addressed in the new policy below.

II. TRANSFER OF PROPERTY (TOP) PENALTY CURE

Effective with the issuance of this memo, the TOP penalty cure policy shall be as follows.

A. NEW POLICY

A transfer of property that would otherwise be subject to a transfer of property penalty per Medical KEESM 5724 which has been returned to the individual or spouse prior to the filing of an application or request for long term care assistance shall not be considered an inappropriate transfer. The value of the returned property shall not be subject to a transfer of property penalty. In this instance, a TOP penalty cure is not required because no penalty has been applied. However, unless the transfer was specifically exempted, any transferred property that remains unreturned at the time of application or request shall be subject to a TOP penalty.

When transferred property (or the fair market equivalent) which is subject to a TOP penalty is returned, the established penalty shall be adjusted by either voiding the penalty entirely or modifying, but not eliminating, the penalty depending on the timing, status and extent of the property returned. In general, a full return of transferred property shall result in the penalty being voided. A partial return of transferred property may result in a modified penalty, but not in all instances.

B. APPLICATION OF POLICY

The TOP penalty cure policy shall be applied in the following manner.

1. FULL CURE

When the property subject to a TOP penalty (or the fair market equivalent of that property) has been returned, the penalty shall be voided. However, the returned property shall be considered when determining eligibility, including back to the date of the original transfer. This means for eligibility purposes the returned property will be treated as if it had never been transferred and had been continuously owned by the applicant/recipient. This may or may not result in eligibility depending on the exempt or non-exempt status of the returned property.

2. PARTIAL CURE

When only some or a portion (but not all) of the property (or the fair market equivalent of that property) subject to a TOP penalty has been returned, the penalty shall be modified (but not eliminated) if the returned property is exempt as a resource. Again, the returned property shall be considered when determining eligibility, including back to the date of the original transfer as though the property had never been transferred.

However, if the returned property is an exempt resource, it should not impact resource eligibility.

a. RETURN OF EXEMPTED PROPERTY

As indicated above, the partial return of transferred property in the form of an exempt resource shall result in the modification of the established TOP penalty. If the returned property is both exempt and non-exempt in nature, the TOP penalty shall not be modified unless the value of the non-exempt property in combination with all other non-exempt property owned by the applicant/recipient is less than or equal to the \$2,000 allowable resource limit.

b. RETURN OF NON-EXEMPTED PROPERTY

The partial return of transferred property in the form of a non-exempt resource shall not result in the modification of the established TOP penalty unless the value of the non-exempt property in combination with all other non-exempt property owned by the applicant/recipient is less than or equal to the \$2,000 allowable resource limit. This means that in most instances, the established TOP penalty will not be modified when non-exempt property is returned.

3. RETURN OF PROPERTY DEFINED

The return of transferred property shall be defined as the direct transfer of property back to the applicant/recipient, any payment made which indirectly results in a gain or benefit to the applicant/recipient, and a modification or revision to a financial instrument which makes the instrument Medicaid compliant.

a. DIRECT TRANSFER

A direct transfer is where ownership is given to the applicant/recipient. That could include return of the actual property that was originally transferred, such as a vehicle, real estate, or a coin collection. Also included is anything of measurable value, even if not the actual property originally transferred, given back to and possessed by the applicant/recipient.

b. INDIRECT TRANSFER

An indirect transfer is where ownership of the property is not being returned directly to the applicant/recipient. Instead, a payment has been made on behalf of the applicant/recipient which results in a gain or benefit to the applicant/recipient. Even though the applicant/recipient exercised no ownership or control of the indirectly returned property, the value of the payment shall be considered a return of property. This would include payment of any expenses or debts of the applicant/recipient such as nursing home bills, home mortgage, credit card balance, or non-covered medical bills.

An indirect payment made on behalf of the applicant/recipient shall be considered returned property in the form of a cash asset. Multiple payments

made in this manner shall be totaled and treated as though returned back to the date of the original TOP penalty start date.

c. MODIFICATION OF FINANCIAL INSTRUMENT

There are instances where the language or structure of a financial instrument, such as an annuity or promissory note, make the instrument subject to a TOP penalty. See Medical KEESM 5722 (4) and (6) concerning actuarial soundness.

Should a TOP penalty be applied due to actuarial unsoundness, the penalty may be cured by modifying the financial instrument to make it actuarially sound. In that instance, there is no technical return of resource to the applicant/recipient, but the TOP penalty has been cured nonetheless. A proper modification making the financial instrument Medicaid compliant shall be considered a full cure (or return of property) for purposes of this policy.

4. VALUATION OF RETURNED PROPERTY

To determine what extent, if any, the TOP penalty has been cured, the value of the returned property must be determined. The value of the returned property shall be determined as follows.

a. CASH ASSET

A cash asset is cash or other property that is readily convertible to cash, such as bank accounts, life insurance, stocks, or bonds. This also includes indirect payments made on behalf of the applicant/recipient as indicated in subsection (3)(b) immediately above. The value of a cash asset is the assigned or market value at the time returned to the applicant/recipient.

b. NON-CASH ASSET

A non-cash asset for purposes of this policy is property [other than cash assets as described in subsection (a) above] that has a subjective measure of value. That would include a vehicle, real estate, or any other property where the value is based on an appraisal. The value of a non-cash asset is the appraised value at the time returned to the applicant/recipient, with one exception.

If the same property that was originally transferred (such as a vehicle or real estate) is returned, the agency shall assume the full value of the property has been returned, even if the value at the time of return is different. The agency shall disregard any depreciation or appreciation in the value of the property that is due to normal wear-and-tear or market fluctuation. However, if there has been a substantial change in the property value due to an improvement (new structure added to real estate increasing the value) or wasting (existing structure demolished decreasing the value), the new verified value of the

property shall be used.

For example, if a new \$25,000 vehicle was transferred and then returned five (5) months later, the agency would accept this as a full return of the transferred property, disregarding any devaluation due to normal use and age. However, if the vehicle was totaled in an accident before return, the diminished value of the property would be used to determine how much of the original \$25,000 value had been returned since the change in value would not be attributed to normal use and age.

C. ANNUITY OR PROMISSORY NOTE

As indicated in subsection (3)(c) above, modification of an otherwise Medicaid non-compliant annuity or promissory note (due to actuarial unsoundness) to make the financial instrument compliant shall be deemed a full return of the transferred resource and therefore a total cure of the TOP penalty. As such, there is no need to determine the value of the returned resource.

For example, a promissory note that was deemed to be actuarially unsound because the terms of the note failed to fully pay back the transferred amount within the lender's life expectancy, the scheduled payments were unequal or provided for deferred or balloon payments, or there was no provision prohibiting cancellation of the note upon the death of the lender would be subject to a TOP penalty based on the value of the note. If the note language was modified to make it actuarially sound, the TOP penalty would be voided without the need to determine the value of the note at the time of the modification.

The same would be true for an annuity that is not considered actuarially sound and a TOP penalty has been applied. Modification of the annuity to be Medicaid compliant would void the penalty. There is no need to determine the value of the annuity as modified since a full return of property has been deemed to have occurred.

C. MODIFYING THE TOP PENALTY

A properly established TOP penalty shall be modified in the following manner when a return of property occurs.

1. FULL CURE

Where the property, or the fair market equivalent of that property, subject to the TOP penalty has been returned, the penalty has been fully cured. The TOP penalty shall be voided as though never implemented. However, for eligibility purposes the returned property shall be considered continuously available to the applicant/recipient back to the date of the original transfer and for all months forward.

If the applicant/recipient is resource eligible (and otherwise eligible), eligibility may be determined for all months (if appropriate) beginning with the month of the original transfer. If the applicant/recipient is not resource eligible, there is no eligibility for any month beginning with the month of the original transfer through the month the property was returned. The returned property will continue to result in ineligibility until the value of all countable resources have been spent down to the allowable resource limit.

2. PARTIAL CURE

Where the full value of the property subject to the TOP penalty has been only partially returned, the TOP penalty shall be modified, but not eliminated.

The returned property will be considered continuously available to the applicant/recipient back to the original TOP penalty start date. This means that unless the returned property is an exempt resource or a countable resource with a value (in conjunction with all other countable resources owned by the individual) less than or equal to the \$2,000 allowable resource limit, the new modified penalty period cannot be imposed because the individual is not otherwise eligible for long term care coverage.

a. NOT OTHERWISE ELIGIBLE

When the applicant/recipient is not otherwise eligible, the existing TOP penalty period remains in place. The return of property does not result in a modification of the transfer penalty. In addition, eligibility for any non-long term care coverage the individual currently receives may need to be discontinued prospectively due to excess resources. Timely notice of the discontinuance is required. However, any non-long term care coverage received from the date of the original transfer through the month of discontinuance is not considered to be overstated eligibility since that coverage has been properly received.

b. OTHERWISE ELIGIBLE

When the applicant/recipient is otherwise eligible (including resource eligible) after the return of the transferred property, the transfer penalty shall be modified. The new modified penalty period shall begin on the date the original TOP penalty period began. The new modified TOP penalty period end date shall be based on the value of property that was transferred but not returned. Since the TOP penalty start date does not change, the same private pay penalty divisor used in the original penalty determination shall be used in calculating the new modified TOP penalty period. See Medical KEESM 5724.4.

If the applicant/recipient is not otherwise eligible back to the original TOP penalty period start date, but eligible in some month thereafter, then the new modified transfer penalty period policy does not apply. The not-otherwise-eligible policy described in subsection (a) above applies. The

applicant/recipient would not be entitled to a new modified TOP penalty period.

Note: Return of property does not change a properly determined community spouse resource allowance (CSRA). Even though returned property is considered to be continuously available back to the start date of the original penalty period, that provision shall not be used to retroactively adjust the CSRA. Only countable property actually owned at the time the long term care arrangement began shall be used for that determination. See Medical KEESM 8144.1 and 8244.1.

D. ADDITIONAL FACTORS

The following additional factors will determine how the modified TOP penalty is applied.

1. DATE PROPERTY RETURNED

In order to void or modify an established TOP penalty period, the return of property must occur prior to the end date of the penalty period. If the return of property occurs after the TOP penalty end date, there is no need to adjust the penalty because the entire penalty period has already been served. In that instance, receipt of the returned property will be considered a gift to the recipient for eligibility purposes rather than a return of property. See Medical KEESM 6410 (27) for the treatment of gift income.

2. NEW APPLICATION REQUIRED

If the individual provides verification of a full or partial cure of the TOP penalty period after forty-five (45) days from the application date, a new application requesting long term care coverage is required. If verification of the return of resources is timely provided [within forty-five (45) days from the date of application], the cure (full or partial as appropriate) shall be completed and eligibility redetermined without a new application. See Medical KEESM 1414.2 (1)(b).

If a new application is required, eligibility for long term care coverage based on a full or partial TOP penalty cure may begin no earlier than the first day of the prior medical assistance period if prior medical is requested and the applicant is otherwise eligible. The agency shall not be required to act on information provided outside of the forty-five (45) day application window which verifies a purported TOP penalty cure unless a new application has been filed.

E. NOTICES

The following notice fragments have been created for use when a TOP penalty period has been applied and property has been returned to potentially cure the penalty either in full or in part. These fragments may be found on the KEES Repository, KDHE Standard Text for Copy and Paste.

1. TOP PENALTY CURED IN FULL – VOIDED

This notice may be used where an established TOP penalty period has been voided due to a full return of transferred property.

“We removed your transfer of property penalty because the property was returned to you. We will tell you if you are eligible for long term care coverage.

This is in accordance with Medical KEESM 5721 (10).”

2. TOP PENALTY PARTIAL CURE - MODIFICATION

This notice may be used where an established TOP penalty period has been partially cured and modified due to a return of some, but not all, of the transferred property.

*“We changed your transfer of property penalty period because some of the property was returned to you. Your penalty is shortened to **{insert penalty start date}** through **{insert penalty end date}**. You are not eligible for payment of long term care services until this penalty period ends.*

This is in accordance with Medical KEESM 5720.1 and 5721 (10).”

3. PROPERTY RETURNED – NO MODIFICATION

The following notices may be used where transferred property has been returned but does not result in a modification of the existing TOP penalty period.

a. NON-EXEMPT PROPERTY RETURNED

When the property returned is non-exempt and will not result in a modification of the existing TOP penalty period, the following fragment may be used.

*“We received proof that some of the property you transferred was returned to you. Your transfer of property penalty period will not be changed at this time. Your transfer of property penalty period remains **{insert penalty start date}** through **{insert penalty end date}**. You are not eligible for payment of long term care services until the penalty period ends.*

This is in accordance with Medical KEESM 5720.1 and 5721 (10).”

b. TOP PENALTY ALREADY SERVED

When some, or all, of the transferred property has been returned after the TOP penalty period has expired, the following fragment may be used.

*“We received proof that some, or all, of the property you transferred was returned to you. Your transfer of property penalty period ended on **{insert***

penalty end date}. Because your penalty period has already ended, the penalty period will not be changed. You are not eligible for payment of long term care services prior to the penalty period end date.

This is in accordance with Medical KEESM 5720.1 and 5721 (10)."

III. QUESTIONS

For questions or concerns related to this document, please contact one of the KDHE Medical Eligibility Policy Staff listed below.

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Questions regarding any KEES issues are directed to the KEES Help Desk at KEES.HelpDesk@ks.gov