

Understanding Medicaid Qualification Basics 2011

by

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THE UNDERSTANDING ESTATE PLANNING AND ELDER LAW IN TEXAS SERIES

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by Randy Drewett, CELA*

I receive calls each week from individuals seeking advice on “how to qualify for long-term nursing home Medicaid.” Most people have heard the horror stories about the rising cost of nursing home care. While Texas is one of the lowest “average cost of nursing care” states, there is little doubt that costs and expenses of long-term care in a skilled nursing facility will continue to rise.

Those families who are faced with paying nursing home costs for a loved one, including the expense of medication and incidentals, may well need \$60,000 or more per year to cover the bill (this amount could be doubled for both husband and wife receiving nursing care). Since the average stay in a nursing home is about 3 years, \$200,000 is not an unusual tab to expect. The overall expenses can be substantially higher for longer stays, such as required in Alzheimer’s cases.

Paying the Cost of Nursing Home Care

Nursing home costs and related expenses are only paid from one of three sources: either the patient will (1) self-pay out of pocket, (2) will have purchased Long-Term Health Care Insurance or (2) must qualify for long-term nursing home Medicaid. The fear of exhausting one’s financial resources in order to pay for nursing home care causes much concern and discussion of alternatives in the community. Unfortunately, few people understand the facts and law relating to qualification for long-term nursing home Medicaid in Texas. National magazines, talk shows, television shows and newspaper articles discuss the problems and often give advice as to potential answers. What these sources of information rarely admit, however, is that Medicaid qualification is not a national issue. The laws that dictate whether or not an individual can qualify for long-term nursing home Medicaid are particular to each state.

Medicare is a national program funded by national appropriations and governed by national rules. The same rules that apply in Texas apply in all other states when Medicare is involved. **Medicaid**, on the other hand, is not a national program. At the present time, Medicaid funds are contributed partially by the federal government and partially by the states. While some rules of the Medicaid program are based upon federal law, the majority of qualification and procedural rules are based upon state law. This means that the rules in Texas may be, and usually are, far different from the rules that apply in other states. Accordingly, when one hears a discussion concerning nursing home qualification or reads an article on the subject, unless the source is based in Texas, the information may well not apply to Texas residents.

The most common mistake made by individuals concerned about the financing of long-term nursing home costs is to rely upon the advice given by others in the community. Even friends who have experienced the process may be quoting an inaccurate understanding of the law, procedures from another state, or simply what they have heard from other people. It is very sad to hear stories from individuals who rely upon bad advice which results in the payment of many thousands of dollars in nursing home costs which could have been avoided had the family consulted an experienced Elder Law Attorney. Even in the legal community, very few attorneys understand the Medicaid system. Out of more than 80,000 licensed attorneys in Texas, there are only 18 Certified Elder Law Attorneys (CELA's are board certified by the National Elder Law Foundation) in Texas at this time. From time to time, I have clients who relate advice that they have received from an attorney concerning the nursing home qualification that is inaccurate. Just recently, I received a call from a financial adviser who related the story of a client to has transferred her home to her daughter in hopes of qualifying for Medicaid. It is clear that the family did not seek competent legal advice from an Elder Law Attorney before deeding the residence out of the owner's name, since one of the most basic rules in Texas is that the homestead is a non-countable resource for Medicaid purposes. At the same time, the transferring of one's residence may create a substantial disqualification penalty. These events are quite common and exemplify why individuals should never undertake to transfer any asset for the purposes of Medicaid qualification without consulting an Elder Law Attorney.

Medicare and Nursing Home Costs

Another common misunderstanding is the relationship between Medicare and nursing home financing. Most senior Texans and their care-givers are familiar with Medicare. Medicare is the federal program that is available to all citizens who have reached age 65 and who qualify to receive Social Security Retirement benefits or Railroad Retirement benefits. Medicare is divided into Parts A, B and D. Qualified individuals receive Part A when they attain age 65, regardless of whether they take early Social Security, regular Social Security benefits at 65, or even if they delay the receipt of Social Security due to continued employment past age 65. Medicare Part B is paid through a deduction from the individual's monthly Social Security check, unless the individual declines the Part B option. Although the list is quite lengthy, Medicare Part A generally covers in-patient hospital expenses while Part B pays for physicians' services, along with medical equipment, X-rays and laboratory tests. Most Texans age 65 and older are covered by Medicare. These are benefits that most people believe themselves to be "entitled" to receive, due to their age and past payments into the system.

Other than a limited, short-term benefit, Medicare does not pay for nursing home care. If an individual covered by Medicare is discharge from a hospital to a nursing home for continued care (rehabilitation) after an inpatient stay of at least 3 days, Medicare will cover 100% of the first 20 days and may pay up to 100 days, subject to a co-payment by the patient of \$141.50 per day for days 21 to 100 (for 2011). Medicare does not pay for the many months and years that some people reside in a nursing home for long-term custodial care. In general, Medicare is limited to short-term acute care. Many of my clients are shocked when first told that Medicare is not going to pay for their loved one's nursing home care. This false sense of security then gives way to many questions which can be summarized as "Who is going to pay the \$4,500 per month for this nursing home care?"

Medicaid and Nursing Home Costs

While Medicare (discussed above) is a federal program, Medicaid is a joint program of the federal and state governments which is usually controlled by state rules. In Texas, the rules are written and enforced by the Texas Health and Human Services Commission (HHSC) in Austin, through local offices in each county. Medicare is an "entitlement." If you are 65 or older and receive Social Security, you are entitled to receive the benefits of the program. But Medicare does not pay for long-term nursing home care. Medicaid is a program for which each recipient must qualify though meeting certain state eligibility requirements – thus, the term "Medicaid Eligibility."

Medicaid Eligibility Tests. "Medicaid Eligibility" in Texas is comprised of two tests: The "Asset Test" and the "Income Test." Basically, the questions are "How much money do you make?" and "How much do you own?" This article will examine the general rules that apply to these two qualification requirements.

Income Cap State. The states are entitled to choose what type of eligibility program will apply in their state from among those available under the federal Medicaid program. Texas joins a few other minority states in choosing to be what is called an "income cap" state. In an "income cap" state, if the Applicant has more than a certain amount of monthly income, then the Applicant does not meet the "income test" and thus does not qualify for benefits, irrespective of the amount of assets owned by the Applicant or the Applicant's spouse. Always remember, the Applicant must pass both tests. The "income cap" is a federal amount that is applicable to all "income cap" states. For 2011, the income cap is \$2,022 per month. This amount is usually comprised of (1) Social Security payable to the Applicant (2) pension or retirement benefits paid to the Applicant from a past employer and (3) Veteran's benefits or military retirement. The income sources listed above are straight income from sources other than an asset principal amount. [If the Applicant has \$3,000 in dividends from stock in an investment account, the principal is a non-exempt asset and would

disqualify the Applicant under the Asset Test regardless of whether or not the amount of income qualified under the “Income Test”].

For example, if a widow is a retired teacher who taught for 40 years in a school system who contributed to Social Security, her income could be \$2,500 per month when adding her Social Security and her Teacher Retirement System annuity payment each month. Assuming she has only her home, furnishings, personal property items and car, she would qualify for Medicaid under the Asset Test (since her residence and vehicle are exempt assets) and she would own less than \$2,000 in non-exempt assets. However, the Texas income cap is \$2,022 and her income is \$2,500 per month. Therefore, she fails the income test and cannot qualify for Medicaid, even though she has almost no assets. To her dismay, the nursing home charges \$5,000 per month which leaves her \$2500 per month short. She cannot afford the nursing home and yet she cannot qualify for Medicaid.

Income Test: “How much money do you make?” In Texas, acceptable maximum amount income that an Applicant can receive each month is called the “Income Cap.” The Income Cap is \$2,022 of income per month. The “Income Test” is determined based upon the income of the Applicant only, without regard to the income of the other spouse. This is called “the name on the check rule.” Only the income which is attributable to the Applicant is counted against him or her. The income cap amount is not flexible. If the Applicant’s income – usually, Social Security, retirement pensions and Veteran’s benefits – exceeds the income cap, even by one dollar per month, the Applicant fails the income test and receives no Medicaid benefits at all. In the example above, the widow teacher has no investments or significant cash assets at all and total income of \$2,500. But nursing homes charge far in excess of \$2,500 per month. The Texas “Average Cost of Nursing Home Care” for 2011 is listed as \$130.88 per day, but in reality, the cost is more likely to be closer to \$5,000 or more per month. This does not include the cost of medications and other necessities of life. In our example, the widow meets the asset test – she has very little assets at all – but she fails the income test, thus disqualifying her from receiving any Medicaid benefits whatsoever. Given this terrible and unfortunate set of circumstances, is there an answer? Yes, current law offers an answer to this “Income Cap” dilemma – it’s called “The Miller Trust” or “Qualified Income Trust.” The specifics of the Qualified Income Trust are discussed below and in much more detail in my article entitled *Understanding The Qualified Income Trust*.

Asset Test: “How much do you own?” As strange as it may seem, the “Asset Test” looks to whether an Applicant is single or married. If the Applicant is married, all of the assets of both spouses are examined to see if there are non-exempt assets which exceed the maximum amount allowed by the rules. In other words, all of the assets of both spouses are considered as though they are owned by the Applicant

spouse. A single individual may own no more than \$2,000 in value of non-exempt assets. The rules which apply to a married couple are different and are discussed below [While the designation of assets is more accurately defined as “non-countable” and “countable” with assets being referred to as “resources” by the actual rules, I have found it easier to use the terms “assets” and “exempt” or “non-exempt” for a simpler understanding of the concepts]. The logical next question, would then appear to be “What assets are exempt assets and what assets are non-exempt?” The answer to this question is based upon Texas law and often differs from asset classification in other states.

Here are some general Texas rules concerning “Exempt Assets:”

1. **The Personal Residence / Homestead.** Exempt assets begins with the Texas homestead. Few states are as protective of the personal residence as we are in Texas. Accordingly, a family’s homestead is exempt from being counted against a Medicaid Applicant in Texas. As a result of a 2006 federal law, the maximum value of a homestead in Texas is limited to \$500,000. Therefore, if the family home is valued at \$200,000, the Applicant can still qualify for Medicaid as long as all other non-exempt assets do not exceed the \$2,000 assets limit.
2. **One Vehicle.** The Applicant’s (or family-owned) personal vehicle is exempt. Even if the Applicant has purchased a new Mercedes, the full value of the vehicle is an exempt asset.
3. **Pre-Paid Burial Plan.** The full cost of a pre-paid burial plan is an exempt expenditure, or asset. In the case of a married couple, both spouses can have a pre-paid burial plan without the value of the plan being counted as an asset. Most individuals do not have such a plan. Therefore, in an effort to minimize assets, a very useful technique is to spend money which would otherwise disqualify the Applicant to purchase a pre-paid burial plan. Picture how unfortunate it would be for an individual to spend down all of their money, live in a nursing home and have no money available to pay for their funeral at the time of death. This would require other family members to pay for this major expense. Under new provisions, pre-paid burial plans for other members of the immediate family are also be exempt.
4. **Burial Plots.** The cost of burial plots or mausoleum spaces for each member of the immediate family, including children, are exempt expenditures. A Medicaid Applicant should always have their burial spaces and burial plans in place prior to making application.

5. **Cash.** As most people know, under current law, an Applicant can have \$2000 in cash or non-exempt assets. This rule is not flexible. If the Applicant has \$2001 in the bank, then the Applicant will not qualify for Medicaid.
6. **Annuities.** The subject of annuities is a very trick one. Many financial advisers recommend the purchase of annuities to their clients who are looking for a safe investment with a higher yield than certificates of deposit offer. In many cases, this advice may be very sound and appropriate for the client. However, when dealing with senior citizens who may ultimately find themselves applying for long term. Nursing home Medicaid, the purchase of annuities is usually a mistake. The type of annuities that are regularly purchased for investments are non-exempt assets. Since these annuities are counted as an asset against the Applicant, many times the annuity must be sold so that the cash can be placed in another type of asset which is classified as exempt. As a general rule, when an annuity is sold, especially within the first seven years of purchase, there is an early surrender penalty which is often substantial. Even worse, seniors often purchase annuities which cannot be sold or cashed in, even for a penalty. In these cases, there is no money to pay the nursing home and the applicant cannot qualify for Medicaid due to the existence of the countable annuity. There are certain types of annuities which are considered exempt assets. These special annuities are not the type of annuities usually sold by insurance representatives or financial advisers. In order to be classified as an exempt asset, the annuity must have a provision that the State of Texas will be repaid from the annuity proceeds upon the death of the owner to the extent that Medicaid paid benefits for the individual. [**Caveat:** The Medicaid laws concerning purchase of annuities has continued to change, especially since the adoption of the Deficit Reduction Act of 2005 in Texas. Never purchase an annuity without consulting an Elder Law Attorney if Medicaid planning could be a concern].
7. **Life Insurance.** Life insurance is limited to \$1,500 of value. While the rules refer to face value, in reality, a policy with no cash value can be transferred without incurring a penalty, since it has no value under the HHSC rules. The real problem arises when there is cash value which must be dealt with as though it is cash.

Any asset that is not defined as “exempt” (or “non-countable”) is counted by Medicaid as “non-exempt” (or “countable”), which may disqualify an Applicant from receiving Medicaid benefits. The asset restrictions described above apply to single individuals. Different rules apply to a married couple in some respects. For instance, the \$2,000 limitation on countable resources does not apply in the same way when there is a “community spouse” at home. Beginning around 1990, laws were put into effect that recognized the need to provide for the spouse at home when the other spouse needed long-term nursing home care. These laws are referred to as “spousal impoverishment” rules. Under these regulations, the spouse at home is entitled to have a certain amount of assets set aside for their care while remaining in the home. For each calendar year, an amount is set by CMS as the “community spouse resource allowance.” The maximum CSRA for 2011 is \$109,560. Therefore, the spouse living at home can retain one-half of the couple’s assets up to the maximum CSRA amount. In reality, however, even the CSRA is usually not enough to protect the lifestyle of the community spouse at home. A Certified Elder Law Attorney can determine whether or not a larger amount of assets can be retained, while still allowing the other spouse to qualify for Medicaid benefits. This is a complicated process which is based upon laws (using mathematical formulas) which have been changing frequently on both the state and national level.

The Texas Health and Human Services Commission

It is also important to understand the proper role of the Texas Health and Human Services Commission. It is not their job to qualify people for Medicaid benefits. It is their job to examine the Medicaid application submitted to them and to determine if the individual qualifies under HHS rules based on the information on the application. Only an experienced Elder Law Attorney can assist an Applicant in utilizing the exceptions available to qualify the Applicant when standard rules would seem to hold otherwise. As of June 1, 2006, most “Medicaid workers” - people who work at your local Medicaid office - were fired and replaced by a telephone system referred to as “Call Centers” which was based outside of the United States in Bermuda. This system was a tragic failure and cost the taxpayers over \$100 million. This contract was terminated by the state. However, since the terminated Medicaid employees had found work elsewhere, there were few experienced Medicaid workers to re-hire. Accordingly, most Medicaid offices were never re-opened for the purpose of assisting those Texans in need of long-term Medicaid services. Most Medicaid applications are assigned to centers in Nacogdoches, Center, Crockett or Midland.

Self-help Remedies

The most common and dangerous myth concerning Medicaid qualification is that all assets of a potential Applicant must be “put in someone else’s name.” Attempting to implement self- help remedies quite often leads to disaster. In some cases, it is possible to rectify the problem; but in other cases, the

transferred assets have been spent or cannot be returned to the Applicant, thus incurring a substantial penalty period of disqualification. By consulting with a Certified Elder Law Attorney, the potential Medicaid applicant (or their representative) can determine what is necessary in order to qualify for long-term nursing home Medicaid. However, without a proper plan, financial transfers and other transactions often result in lengthy periods of disqualification (penalty periods). While “transfer penalties” have always been a problem, the new federal Deficit Reduction Act of 2005 has made the resulting penalties from transfers catastrophic. A family faced with nursing home care of a loved one must never transfer (gift) assets without consulting an Elder Law Attorney. Failure to understand these provisions can result in months or years of disqualification from the Medicaid program, even if the Applicant no longer has any money and no other means to pay for nursing home care.

Addressing the Income Cap Issue

What type of planning is required when an Applicant has too much income to fall within the Texas income cap? In other words, how can an Applicant qualify for Medicaid benefits when their Social Security check and their retirement pension check exceed the Texas income cap of \$2,022? Since these monthly income items are permanent and are not based upon any underlying assets (such as interest being paid on a certificate of deposit), the only remedy available is for the Applicant to have a “Qualified Income Trust” established. In these cases, it is most important to understand how a Qualified Income Trust satisfies the Texas income cap requirement and how that trust must be established and administered.

The Miller Trust [also called a “Qualified Income Trust” or “Q.I.T.”]. The Qualified Income Trust had its origins in Colorado when the 1990 case of *Miller v. Ibarra* established a mechanism which allows income to be assigned in a manner which would allow the Applicant to qualify under the income test, even when the Applicant’s income exceeds the monthly allowable income cap. There are different names used to refer to this type of trust. Since the original case was filed in the name of “Miller,” the trust became initially known as a “Miller Trust.” The federal law was changed to recognize this trust in the tax act called *OBRA ‘93* and the specific reference is 42 USC Sec. 1396p(d)(4)(B). Most recently, the name “Qualified Income Trust” or “QIT” has become popular. In order not to become confused, it is important to understand that all of these references are to the same type of trust.

The Qualified Income Trust serves one purpose only. It is a mechanism whereby an individual who is seeking eligibility for nursing home Medicaid can meet the income test requirement in an income cap state, when the Applicant’s income would otherwise exceed the income cap in that state [The term “Applicant” is used quite often during the course of this article. In every instance, “Applicant” refers to the individual who is applying for Medicaid benefits and the person whose income is being deposited into the Qualified

Income Trust Account]. In order for this definition to make sense to the ordinary reader, he or she must become familiar with the terms “Medicaid eligibility,” “income test” and “income cap state.” Additionally, it is most important to understand that there are three separate and distinctive issues that must be addressed in every Qualified Income Trust case:

- A. The Qualified Income Trust must be **properly written** by a Texas Elder Law Attorney so that it complies with all rules and regulations in order to qualify as a “Qualified Income Trust” by the Texas Department of Human Services;
- B. The Qualified Income Trust Account must be **properly established** at a bank or other financial institution in order to initially receive qualification for Medicaid benefits; and
- C. The Qualified Income Trust Account must be **properly administered** each month to continue Medicaid eligibility for the Applicant.

Creating and Administering the Qualified Income Trust Account. Not only must the Trust be written to comply with specific rules and regulations in order to qualify the Applicant for Medicaid, but in addition, the Trust procedures must be followed in detail as the Qualified Income Trust Account is established and as the Trust is administered over the months or years of the Applicant’s eligibility period.

A. **Creating the Qualified Income Trust Account.** Even the best Qualified Income Trust is worthless if (1) it is not properly administered by the establishment of a proper Qualified Income Trust Account at a bank, credit union or brokerage firm and if (2) the correct amounts are not disbursed at the right time to the right people. In setting up the Qualified Income Trust Account, keep in mind that financial institutions require an initial deposit, or “seed money” which must go into the new account, with the bank’s required minimum amount remaining in the account at all times. This is perfectly alright; in fact, it must be done. In a perfect account, there will be a small amount of money at the beginning of each month (after all regular disbursements); the account will not be an interest bearing account; and the account will have no monthly service fee. This is not always possible.

In summary, the account must be established as follows:

- 1. New bank account set up at a bank, credit union or similar institution;
- 2. Account should be a non-interest bearing checking account;
- 3. The Applicant’s Social Security Number will be used for the account;
- 4. The account will be opened with the minimum amount required;
- 5. The account will be opened in the name as it appears in the original Trust;
- 6. Only the Trustee of the Qualified Income Trust will open and sign on the account;
- 7. The account must be a “checking” account;

8. The Trustee must be able to write at least 6 checks per month;
9. The account cannot be a “survivorship” account.

B. Operating (Administering) the Qualified Income Trust Account. In order to maintain the Medicaid eligibility for the Applicant, it is mandatory that the trust be operated with all transactions complying with Medicaid rules and regulations. The checks will be written just like any person would write checks on their personal checking account. However, all checks must be written to the correct entity, in the correct amount at the correct time. Failing to do this properly may result in denial of Medicaid benefits for one month or more. The general rules must be followed to properly operate the Qualified Income Trust Account are as follows:

1. All income which comes payable to the Applicant must be deposited into the Qualified Income Trust Account during the month it was received;
2. Do not deposit income received during the month prior to the establishment of the Trust;
3. It is preferable to have monthly income deposited directly into the Qualified Income Trust Account (such as the Applicant’s Social Security or pension check);
4. If this is not possible, the checks payable to the Applicant individually (or even checks which are “direct deposit” to another account) must be deposited into the Qualified Income Trust Account during the month in which they are received;
5. Checks are payable in a certain order referred to as “First Priority” and “Second Priority” and are distributed as follows:

a. First Priority:

- (1) The “Personal Needs Allowance” which is used to pay for any miscellaneous needs of the Applicant (the amount for 2011 is \$60.00).
- (2) The “allowance,” if any, approved for payment to the Applicant’s spouse or dependents;
- (3) All non-reimbursed medical expenses, including the Medicare “Part B” premium, if any (this is usually deducted from the Applicant’s monthly Social Security check);
- (4) Medical insurance premiums, such as a Medicare Supplement (“Medigap” policy) or health insurance;
- (5) Medical expenses not covered by public benefits or insurance;
- (6) Administrative costs, such as bank fees or service charges, income tax preparation fees, attorney fees or taxes attributable to the trust, if any.

b. Second Priority:

(1) “Applied Income.” This is the income that must be applied directly for the Applicant’s care; this is usually paid for nursing home expenses; this check will usually deplete the Qualified Income Trust Account down to the minimum amount required by the bank to remain in the account to keep it open.

6. Always keep a current and accurate register of all checks written, preferably on a computer banking software program, such as “Quicken;”

7. Always balance the Qualified Income Trust Account statement when it is received each month – remember, errors in the operation of the Account, even unintentional errors, can cause loss of benefits which is usually in the thousands of dollars for which the Trustee is personally liable.

8. The filing of a separate income tax return for the Qualified Income Trust should not be required, since no income will be produced in a “non-interest bearing” account.

The Most Important Rules!

1. **ALWAYS INVESTIGATE LONG-TERM HEALTH CARE INSURANCE.** If you can possibly afford it, always investigate the purchase of long-term health care insurance. It can save the family’s assets from unnecessary spend-down and secure the community spouse’s financial position in many cases. **But coverage must be from a highly reputable company such as Genworth Financial. Purchasing LTC insurance from a company with a poor track record is no better than investing in an investment scam.**
2. **DON’T GUESS!** If the Applicant is not covered by long-term health care insurance in an amount sufficient to cover all nursing home and related expenses, it is probably necessary to analyze and address qualification issues. The only person qualified to assist you with these issues is your Elder Law Attorney, Even though the consultation will require the payment of attorney fees, this cost is much less expensive than losing benefits because of an inadvertent mistake.
3. **APPLICANTS MUST SATISFY BOTH MEDICAID QUALIFICATION TESTS.** The Qualified Income Trust only addresses one of the two Medicaid qualification tests – the “Income Test.” The Qualified Income Trust does not qualify an Applicant who does not qualify under the “Asset Test.” A Qualified Income Trust alone does not make an Applicant qualify for Medicaid in many instances. An Applicant cannot qualify for long-term nursing home Medicaid benefits until the Applicant can pass both tests.

Issues of Special Importance

It cannot be overemphasized that Medicaid laws change regularly with little or no notice to the public. Actions taken by individuals based upon what they hear or read usually have disastrous results. A few examples appear below:

Revocable Living Trusts

Over the past 20 years, the use of Revocable Living Trusts have substantially expanded in Texas. Much of this is due to the existence of “Living Trust Scams” perpetrated by “door-to-door” salesmen, usually sent by an insurance company attempting to sell annuities. The U.S. Justice Department and other states put these companies out of business, but Texas has very weak state-elected law enforcement officials in Austin and these companies have been allowed to rob seniors blind over the past decade. Not all living trusts are bad. If your estate planning attorney recommends implementing such a trust (for purposes other than avoiding Texas probate), there is probably an advantage to be gained. Unfortunately, living trusts and Medicaid qualification no longer co-exist. In 2006, the HHSC decided to re-classify a residence held in a living trust as a countable resource. This has never been the law in Texas and no new law was passed. This is an example of the irresponsible conduct of state and federal Medicaid enforcement agencies. For the present, a couple with a living trust cannot qualify for Medicaid and the homestead held in the living trust is no longer exempt. The trust must be revoked and the residence must be deed back to the original Settlers of the trust.

Gifts or Re-titling Assets

Under the new Deficit Reduction Act of 2005 (implemented in Texas in 2006), the use of structured gifting was eliminated. This new Act changed both of the major components of gifting:

Look Back Period. The traditional 3 year (or 36 month) look back period for gifting was eliminated and replaced with a 5 year look back period for all transfers made after February 6, 2006.

Commencement of Transfer Penalty. In the past, penalty periods for transfers began when the transfer was made. The DRA 2005 changed this. The penalty now does not begin to run until the Applicant is in the nursing home and otherwise qualifies for Medicaid.

Self-help Gifting. Many people go ahead and make gifts, deed real estate or change the names on accounts assuming that they will be able to qualify for Medicaid benefits. This is far from the truth. In fact, the opposite is true. Taking such actions without consulting with a Medicaid attorney will result in long periods of Medicaid disqualification. No actions should be taken with a view toward Medicaid qualification unless it is a structured program supervised by an Elder Law Attorney.

Purchasing Annuities

Standard annuities are now countable resources. An applicant cannot qualify if he or she owns an annuity. Additionally, since Medicaid does not recognize community property laws, the Applicant's spouse cannot own an annuity unless if qualifies under the spousal resource allowance rules. The only annuities which are classified as exempt are those which name the State of Texas Medicaid Agency as primary beneficiary. Additionally, these annuities have other very strict rules which differ significantly from standard investment annuities. Accordingly, if Medicaid could ever be an issue, do not purchase an annuity without consulting with an Elder Law Attorney.

Powers of Attorney

Everyone should have a financial durable Power of Attorney. But not all POA's are alike. A standard Texas Statutory Durable Power of Attorney is generally not suitable for seniors who may face Medicaid issues in the future. The terms of that POA are too restrictive in several areas of planning. Accordingly, seniors should consult with an Elder Law Attorney prior to signing a Power of Attorney.

Last Will & Testament

Everyone needs a Will. But not everyone needs the same type of Will. Probably 99.9% of married seniors with Wills leave their entire estate to their spouse. In the Medicaid world, this may have disastrous results. All seniors should consult with an Elder Law Attorney to determine what type of Will is best suited to their needs. Many times, it may be a Will which creates a Special Needs Trust for their spouse rather than giving their estate to their spouse outright.

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[Revised 4/1/2011 - This article may not be construed as the giving of legal advice. The laws which control the practice of elder law change frequently and may have changed since the date this article was written.]