

Understanding the “Qualified Income Trust” 2011

by

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It is not unusual for me to get several calls each week by individuals wanting to make an appointment because they have been told that they, either personally or on behalf of another, “need a Qualified Income Trust.” [The “Qualified Income Trust” is also referred to as a “Miller Trust” and will be referred to in paragraphs below as the “QIT”]. When I ask why they “need” a Qualified Income Trust, most do not know what it is, what it does, or why they might need such a trust, other than the fact that someone told them that they need one. Since there is such a void of understanding in the area of Medicaid planning, I am writing a series of articles to address some basic, and some not so basic, areas of Elder Law.

The QIT 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 QIT 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 important to understand that there are three separate and distinctive issues that must be addressed in every QIT case:

1. The QIT 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;
2. The QIT Account must be **properly established** at a bank or other financial institution in order to initially receive qualification for Medicaid benefits; and
3. The QIT Account must be **properly administered** each month to continue Medicaid eligibility for the Applicant.

Medicaid Eligibility. Most senior Texans and their caregivers 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 Part A, Part B and Part 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. Part D is the new Medicare prescription drug plan.

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 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 (in 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 \$4,000 per month for this nursing home care?" The answer is that there are three ways to finance long-term care in a nursing home:

1. **Self-pay:** You must pay the monthly bill out of pocket.
2. **Long-term health care insurance:** Very few people have purchased this coverage.
3. **Medicaid:** A joint federal-state program which pays for nursing home costs for people who qualify for these benefits.

While Medicare (discussed above) is a federal program, Medicaid is a joint program of the federal and state governments and are 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" is comprised of two tests: The "Asset Test" and the "Income Test." 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 deemed – or considered owned by the Applicant spouse – against the spouse seeking Medicaid benefits. A single individual may own no more than \$2,000 in value of non-exempt assets. On the other hand, 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 Asset Test is covered in more detail in my article entitled "Medicaid Eligibility in Texas." It is of utmost importance that people understand this one simple fact: Every Medicaid Applicant must meet BOTH tests in order to obtain benefits.

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 2009, 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. If an 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 the Applicant's monthly income. The income sources listed above are pure income from sources other than an asset principal amount.

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 \$2,350 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 \$2,350 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 \$2,650 per month short. She cannot afford the nursing home and yet she cannot qualify for Medicaid.

Income Test. Every Medicaid Applicant must meet two tests: the asset test and the income test. In Texas, the income cap is \$2,022 of income per month. This only applies to the income of the Applicant and not to the spouse's income, if the Applicant is married. However, the cap is firm. 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 \$2,350. But nursing homes charge far in excess of \$2,350 per month. The Texas, the monthly cost of nursing care 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?

The Qualified Income Trust [also called a "QIT" or "Miller Trust"]. The QIT 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 3 different names used to refer to this type of trust: (1) Since the original case was filed in the name of "Miller," the trust became initially known as a "Miller Trust;" (2) 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), thus this type of trust is referred to by many attorneys as a "(d)(4)(B) Trust;" and (3) 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 QIT is very unusual when compared to other types of trusts. The Trust must be established and administered in a very precise manner. While most trusts are centered around the principal assets contained in the trust, the QIT focuses exclusively on the income which comes into the trust and is paid out of the trust on a monthly basis. No principal assets are held by the trust over a period of time, as in most trusts. The QIT is comprised of two primary components: (1) The QIT Agreement and (2) the QIT Account. When an

Applicant seeks Medicaid benefits, the HHSC will want to see the QIT Agreement if the Applicant's fixed income exceeds the income cap. The trust must comply with Medicaid rules. Additionally, there must be a depository account established in a bank or other financial institution which will receive the deposit of all monthly income attributable to the Applicant – such as the Social Security check or pension check.

All of the Applicant's income must be deposited into the QIT Account. Each month, the account will pay out (1) the Applicant's "personal needs allowance" which is a small amount set by law – \$60 per month for 2011, (2) the Applicant's Medicare Supplement Insurance (Medigap) Policy premium, (3) any spousal amount fixed by the DHS in accordance with the law, if the Applicant is married and if it is applicable, (4) with the balance being paid to the nursing home to be applied against the monthly balance of the nursing home account. If all is in order, Medicaid will pay the balance due to the nursing home.

In the example of our teacher, the full amount of income (\$2,350 per month) would be direct deposited to the QIT Account. Out of the account would be paid the Applicant's monthly personal needs allowance (\$60) with the remaining balance of \$2,290 being distributed to the nursing home. Since the nursing home's monthly bill is \$5,000, Medicaid would pay \$2,710 and the widow would receive the nursing care that she needs. Without the QIT, she would not be eligible to receive any benefits from Medicaid whatsoever. In assisting the Applicant with a QIT, an experienced Elder Law Attorney will (1) determine the necessity for the QIT as part of an overall plan designed to qualify the Applicant for Medicaid benefits, (2) create a QIT for the Medicaid Applicant and (3) give the QIT Trustee complete written instructions on how to establish the QIT Account and administer the QIT on a regular basis.

The Banker's Myth. Banks that are not familiar with QITs sometimes say that you must have a Tax Identification Number (obtained by filing a Form SS4 with the IRS) for the trust and that it must be notarized. Neither of these statements is true. If the financial institution is not aware of these rules, or worse, if they attempt to demand compliance with their view of how the account is to be established, the best advice is to find another bank or credit union – one that is actually familiar with QIT Accounts.

A. Tax Identification Number. A QIT does **not** apply for a Tax Identification Number, nor is the trust account set up using such a number. There is an IRS directive which specifically states that QITs should **not** apply for Tax Identification Numbers – the account is opened under the Social Security Number of the Applicant. Therefore, only the Applicant's Social Security Number is necessary to set up the account.

B. Notarization. A QIT does **not** need to be notarized. The use of a notary has become very misunderstood in business practices. Using a notary is called an "Acknowledgment." An Acknowledgment is used for documents that will be recorded at the courthouse. Unfortunately, many people believe that having a document notarized makes it more "legal" somehow, but this is not true. Deed, affidavits and some contracts are notarized. Most other documents are not. Since a QIT will not be recorded at the courthouse, it does not need to be notarized. Looking for some examples? Believe it or not, a Will is not notarized. The "Self-Proving Affidavit" attached to most Texas Wills is notarized because it is taken under oath, and as I said, affidavits are notarized; but that affidavit is not legally part of the Will – the Will is valid without the affidavit or the notary. A Promissory Note is not notarized - even if it is for a million dollars. Partnership Agreements are not notarized in my office. Powers of Attorney are notarized because they are a contract that will usually be recorded at the courthouse. It is often inconvenient for the Grantor of a QIT to find a notary. Being notarized, but it does not make it any more "legal."

Creating and Administering the QIT 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 QIT Account is established and as the Trust is administered over the months or years of the Applicant's eligibility period.

A. Creating the QIT Account. Even the best QIT is worthless if (1) it is not properly administered by the establishment of a proper QIT 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 QIT 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 QIT 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 QIT 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 QIT Account are as follows:

1. All income which comes payable to the Applicant must be deposited into the QIT 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 QIT 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 QIT 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 2009 is \$60.00) – this check is made payable to the Applicant individually and can be deposited into the Applicant’s personal checking account or cashed by Applicant’s “agent” under a valid “Durable Power of Attorney;”

(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 QIT 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 QIT 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 QIT should not be required, since no income will be produced in a “non-interest bearing” account. If interest income is accumulated for some reason, see your Elder Law Attorney or CPA for specific advise concerning trust income reporting options and requirements.

THE MOST IMPORTANT RULES!

1. ALWAYS INVESTIGATE LONG-TERM HEALTH CARE INSURANCE. If you can possibly afford it, always investigate the availability 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 as always, when addressing business and financial needs, talk to a professional who is experienced in dealing with long-term health care insurance – not just any insurance salesperson will do!

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 an attorney who is

thoroughly familiar and experienced in public benefits law. 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 QIT only addresses one of the two Medicaid qualification tests – the “Income Test.” The QIT does not qualify an Applicant who does not qualify under the “Asset Test.” Most Elder Law Attorneys can assist an Applicant with both tests, but a QIT 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.

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