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THE SOLE BENEFIT TRUSTS
under 1396p(c)(2)(B)(iii) and 1396p (c)(2)(B)(iv)

Marilyn G. Miller, CELA *

*Certified as an Elder Law Attorney by the National Elder Law Foundation
as recognized by the State Bar of Texas

Author Contact Information:
Marilyn G. Miller
PO Box 917
Dripping Springs, Texas 78620

Marilyn@mgmillerlaw.net
512.894.0319

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by Marilyn G. Miller

Consider this Scenario: A good referral source has sent you a new client for Medicaid. Millie is a widow who has a progressively deteriorating physical condition and she now must move to a skilled nursing facility. Her income and assets were sufficient to allow her to stay home with assistance, but will not be enough to pay for skilled care. You calculate that if she pays privately at the facility of her choice, her assets, including the value of the house, will last about three years. Millie has two daughters, Debbie who is 67 years old and was born with Down syndrome, and Peggy who is financially well off. Millie also has two healthy, grown grandchildren whose college educations she paid for about ten years ago. Millie owns a home with a modest mortgage, but there is nobody who wants to live there and the cost to let it sit empty is prohibitive so she will need to sell it. During your interview she tells you that she has a favorite niece, Nancy, age 47, who was injured in a car wreck when she was 32 and who is receiving “Social Security”. Millie pauses for a moment and tells you that she always wanted to leave something to Nancy to help her out, but probably can’t do anything now. Or can she?

I. UNCOMPENSATED TRANSFER RULE

A. The general Medicaid rule regarding uncompensated transfers (i.e. gifts) is that if an individual or the spouse of an individual disposes of assets for less than fair market value Medicaid imposes a penalty for the purpose of determining eligibility for benefits. But the law also provides several exceptions. These generally involve transfers that will protect the Medicaid applicant’s spouse or applicant’s child who is blind or permanently and totally disabled as defined under SSI or under title XVI, or to a trust established for the sole benefit of an individual under 65 years who is disabled as defined under SSI.¹

B. Exceptions Under 42 USC §1396p²

1. **(c)(2)(A)** Provides exceptions for transfers for the sole benefit of the spouse of the Medicaid applicant.

¹ I realize that it more correct to speak in terms of “persons with a disability” rather than “disabled persons”, however since the statutes, secondary guidance materials and most of the literature refer to “disabled persons”, I accept this convention for the purposes of this discussion.

² The number refers to the section of the US Code, §1396p, that contains the provisions relating to the transfer of assets into exempt trusts.

2. **(c)(2)(B)**³ Transfers to the applicant's disabled child, or to a trust established solely for the benefit of the individual's disabled child, or a transfer to a trust established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI rules.
3. **(d)(4)(A)**⁴ A trust created by a physically disabled individual, parent, grandparent, legal guardian or a court which is funded with the assets of a disabled person under age 65.
4. **(d)(4)(B)** Qualified Income Trust. Also sometimes referred to as a "Miller Trust". This trust allows an individual who is ineligible for Medicaid long term care benefits because of excess income to obtain eligibility.
5. **(d)(4)(C)** A trust established and managed by a non-profit organization into which assets of a disabled individual under age 65 may be transferred.

II. DUAL QUALIFICATION SOLE BENEFIT TRUSTS

The exceptions that are most helpful to Millie's situation are found at 42 USC §1396p(c)(2)(B)(iii) and (B)(iv). These trusts serve the dual purpose of allowing the Medicaid applicant to avoid imposition of a penalty despite the transfer, while also allowing the recipient to remain eligible for benefits.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

...

(B) the assets—

...

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

In Texas, guidance for the rule is set out in the Medicaid for Elderly and People with Disabilities Handbook ("MEPD") Section I-3300:

³ Technically all of the "exception trusts" must be for the sole benefit of the beneficiary, but the 1396p trusts are funded with third party money. They are also often referred to as "Dual Qualification Trusts".

⁴ The d(4)(A), d(4)(B) and d(4)(C) trusts also fall into the category of exception trusts. They are funded with first party money and have payback requirements.

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