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Medicaid Update

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I. MEDICAID POLICY ON INDIVIDUAL RETIREMENT ACCOUNTS

A. SOURCES OF LAW

Until early 2015, assets of tax-deferred retirement accounts were treated as resources by the Texas Medicaid program to the same extent as if the same assets were in "nonqualified" accounts, except amounts deductible for income tax were deducted for Medicaid purposes. As recounted below, that changed in February 2015, when deferred annuities held in IRAs became exempt. It changed again in 2018 when any assets of retirement accounts subject to Required Minimum Distributions (later limited to IRAs subject to RMD) were exempted.

For almost every other type of asset, there is a source of law in the form of a federal statute, rule or policy providing that state policy may be no more restrictive than the federal law or policy. IRAs are different because no federal law or policy requires states to treat assets held within IRAs differently from other assets that can be readily converted to cash; and most states do not exempt them. The mystery is deepened by the apparent change in policy referenced below, in which this exemption became restricted to IRAs, when there are many other tax-deferred accounts that are indistinguishable for any apparent Medicaid purpose: 401k's, 403b's, 457's, federal Thrift Savings Accounts, etc. Since the most recent informal communications from HHS referring to this policy refer only to "IRAs," we cannot know for sure whether the policy applies only to Traditional IRAs or whether it may extend to SIMPLE IRAs and SEP-IRAs. We can be confident that the exemption of an IRA based on Required Minimum Distributions does not apply to a participatory Roth IRA because they have no RMD. The policy may or may not apply to an *inherited* Roth IRA, which would have RMD.

The closest we have now to a source of law—and it is not law—is the response of HHS to a Public Information Request by the Texas Chapter of the National Academy of Elder Law Attorneys on January 13, 2021, which requested documents "related to Medicaid eligibility and IRA assets." The agency provided a PowerPoint presentation, the relevant part of which is attached as Appendix 2 to this paper; and two case memos, which are reprinted in Appendix 3. The discussion below references several previous agency presentations. The listserv of the Texas Chapter of the National Academy of Elder Law Attorneys (which is restricted to members of the Chapter) has been a valuable source of anecdotal information on this topic, as have other activities of the Chapter such as its CLE conferences and annual "Unprogram."

In summary, current Texas Medicaid policy regarding exemption of some retirement accounts is remarkable for two reasons: (1) it is less restrictive on Medicaid eligibility than federal law requires, and (2) it is unwritten. For both those reasons, Texas elder law attorneys routinely advise every Medicaid client with a retirement account not only that it is or may be made exempt, but that the policy making it exempt may be changed without notice and without a right of appeal, at any time.

With that caution firmly in mind, please proceed to a discussion of the specifics of what your authors believe to be the policy, at this writing. But be advised, as our clients are advised, that the agency's policy may change without notice before you take any act or give any advice in reliance on this paper.

B. DEFERRED ANNUITIES IN IRAS ARE EXEMPT

At a conference in February 2015, Shari Nichols, a representative of the Texas Health and Human Services Commission addressed the question, "If funds in an IRA are held in a Certificate of Deposit or other countable investment product and then used to purchase an annuity, are the IRA funds exempt? Her oral answer, in a word, was "Yes."[1] The first place that was reduced to writing was in the agency's slide at this conference in August 2015. She gives the same answer to the same question in the February 2020 slide quoted in Appendix 2 to this paper.

What surprised elder law attorneys, and the reason we are concerned about the permanence of the policy, was that the federal Medicaid law referring to "annuities" is interpreted by most Medicaid programs to refer only to *immediate* annuities, making payments at regular intervals such as monthly.[2] The idea that one could transfer funds from a $50,000 CD in an IRA to a deferred annuity in the same IRA and thereby make it exempt for Medicaid purposes was both welcome and surprising.

In her oral presentation in August 2015, Ms. Nichols commented that the annuity provision of the federal Medicaid statute is generally construed to apply only to the transfer penalty and not to create a new resource exemption for deferred annuities.[3] Therefore, the Texas Medicaid program is not required by federal law to have this exemption, and it is subject to being withdrawn at any time.

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[1] Shari Nichols, *The View from HHS,* University of Texas School of Law, 17th Annual Estate Planning, Guardianship and Elder Law Conference (August 6–7, 2015).

[2] See, e.g., 42 USC 1396p(c)(1)(G). The written Texas policy on annuities (which does not expressly say whether it applies to deferred or immediate annuities) is at MEPD Handbook Section F-7210 and F-7220.

[3] 42 U.S.C. §1396p(c)(1)(G).

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