

MEDICAID FREQUENTLY ASKED QUESTIONS

1. How does one qualify for Medicaid long-term nursing home benefits (“Medicaid”)? An applicant must:

- a. be a U.S. citizen or an alien lawfully living in the U.S. AND reside in the state where they are applying for benefits;
- b. be over 65, disabled or blind;
- c. have a “medical necessity” requiring skilled nursing care;
- d. meet the income cap which means the applicant cannot make more than \$2,022.00 (in 2011) per month in income; and
- e. have only limited assets.

2. If an individual qualifies for Medicaid, can he get into any nursing home?

Not all nursing homes accept Medicaid benefits. Of those nursing homes that do, the nursing home may only accept a limited number of Medicaid recipients. Additionally, the Medicaid “bed” generally is in a semi-private room.

3. What if the applicant receives only \$1,000.00 per month in income but the other spouse receives \$1,700.00 or even \$3,000.00 per month in income?

The applicant will not have a problem with the income cap because he is receiving less than \$2,022.00 per month in 2009 and 2010. The Medicaid Agency only looks at the applicant’s income for Medicaid eligibility. If a couple are receiving rental payments from a lease of their land or are receiving note payments, the Medicaid Agency will consider that the income goes to the spouse whose name is on the check.

4. What if the applicant otherwise qualifies for Medicaid long term nursing home care except that the applicant’ income exceeds the income cap?

If the applicant otherwise qualifies for Medicaid long term nursing home benefits, the applicant (or the applicant’s spouse or duly appointed agent) may create a Qualified Income Trust or “Miller Trust.” This trust allows the applicant to transfer his/her income into the trust and then qualify for Medicaid long term nursing home care benefits. Among other provisions, the trust must provide that upon the death of the beneficiary/applicant, the State of Texas or Arkansas will be reimbursed for all expenditures made on the applicant’s behalf. If the applicant is married, the benefits will be paid out of the trust as follows:

- a. \$60.00 allowance to the beneficiary/applicant (\$40.00 in Arkansas) and any guardian fees will be paid;
- b. an allowance will be paid to the at-home spouse (referred to as the “community spouse”) to bring the community spouse’s income up to \$2,739 in Texas (minimum monthly maintenance needs allowances for a community spouse 2011) or \$1,839.00 in Arkansas.

There may be an allowance provided for dependant(s) living at home;

- c. If there are any “incurred medical expenses” such as supplemental (medigap) medical insurance premiums and costs of medical care not covered by approved by Medicaid, those amounts can be paid out of the trust;
- d. ‘applied income” (an amount calculated by the Health and Human Services Commission) Will be paid to the nursing home;
- e. any remaining income can be disbursed for the beneficiary/applicant’s medical needs not provided by Medicaid but, practically speaking, seldom will there be any funds left after payment of the applied income.

5. Can I transfer my assets into a Miller Trust to protect the assets?

No. A Miller Trust is ONLY used to overcome the income cap issue. A Miller Trust is NOT a trust used to protect assets (resources).

6. What are the limited non-exempt assets that an individual can own and still qualify for Medicaid?

To qualify for Medicaid, an unmarried individual’s countable resources (assets) cannot exceed \$2,000.00.

7. What are the limited non-exempt assets that a couple can own and either one or both still qualify for Medicaid?

If both spouses are applying for long term care nursing home benefits, then their combined countable resources generally cannot exceed \$3,000.00.

If only one spouse is applying for Medicaid benefits, the community spouse will keep more than \$2,000.00 in assets. When the Medicaid application is made, all available non-exempt resources of both spouses will be counted as resources, whether the property is classified as community or separate. One half of the couple’s resources will be set aside for the spouse not applying for Medicaid benefits, with a minimum set aside amount of \$21,912.00 and a maximum of \$109,560 in 2011.

There may be ways in which to increase the maximum amount that can be set aside for the spouse staying at home but the strategies can be complex and should be discussed with one of the attorneys at Ross & Shoalmire, LLP.

8. What if I am told that I have to “spend down” resources before I or my spouse qualifies for Medicaid. Should I “spend down” before I make application for Medicaid or after the application is made?

Spending down before or after the application is not the key. The Medicaid Agency gives you a credit for all monies spent after you enter a medical facility and ultimately stay for 30 days or more. For example, Wife has a stroke and goes into the hospital in September. On October 4, she is moved into a nursing facility and continues to reside there. Her husband makes application for Medicaid benefits for her in December. The Medicaid Agency will determine what their assets were on September 1 and

again on December 1 to see if they have already spent funds to meet any spend down.

When only one spouse is applying for Medicaid, it is best to “spend down” AFTER the Medicaid application is filed. This is generally AFTER a person goes into a nursing home.

9. Are all of a person’s resources or assets counted when determining Medicaid eligibility?

No. The following assets are exempt from being included as a resource.

- a. The principal residence of the Applicant up to a value of \$500,000.00;
- b. A burial plot held for the Applicant or the Applicant’s family;
- c. Term or burial insurance, if it has no cash value;
- d. Identifiable burial funds in the amount of \$1,500.00 or a prepaid irrevocable burial contract regardless of the value;
- e. One automobile is exempt, regardless of value;
- f. Household goods and personal items;
- g. Life insurance policies owned by the Applicant with total face values of \$1,500.00 per insured person or less;
- h. Livestock and poultry that are held for business purposes or for consumption;
- i. Business property essential for self-support; and
- j. Non-business property valued at up to \$6,000.00, essential for self-support (generally mineral interests).

10. If I go into a nursing home, will I have to sell my homestead and spend the money before I can qualify for Medicaid long-term nursing home benefits (“Medicaid”)?

No, you do not need to sell your homestead and spend the money in order to qualify for Medicaid. The Medicaid Agency considers your homestead an “exempt” asset and therefore will not include it when determining your eligibility. For a discussion of “Estate Recovery” after the death of a Medicaid recipient, see the next paragraph #11.

11. Will the State take the homestead if either I or my spouse receives Medicaid assistance?

No. But your executor may have to sell your homestead and your family heirlooms after you die if you accept Medicaid assistance unless your heirs can claim an exemption or waiver from estate recover. The following is a brief overview of the new rules.

It is important to note that, effective September 1, 2003, the Texas Legislature passed a law requiring the implementation of an estate recovery statute based on federal requirement to attempt to recover State Medicaid expenditures from the estate of a deceased Medicaid recipient. The rules were effective as of March 1, 2005. According to the rules, there will be no estate recovery, every, when the deceased Medicaid recipient has a surviving spouse, minor children, disabled child of any age) or an unmarried adult child who lived in the homestead at least one year immediately prior to death. This is not a lien statute so the state will not “take” the homestead. The statute makes the State a creditor just like a doctor or ambulance company and just like any creditor, if there are no exemptions or waivers from collection, the creditor can require the executor to sell estate assets to pay the debt.

A. Who is subject to estate recovery?

1. Over 55 years old
 2. According to the Medicaid Agency, program payments for: Nursing home, intermediate care facility for the mentally retarded (referred to as "ICF-MR" and including state schools), community Living Assistance and Support Services (CLASS), Deaf-Blind/Multiple Disability Waiver (DBMD), Home & Community Based Services (HCS), Texas Home Living (TXHL), Community Waiver programs (CWP), Community Based Alternative (CBA including Star Plus), Community Attendant Services (1929(b)) and hospital and prescription drug services arising from any of the noted programs; and
 3. Those who initially applied for Medicaid assistance on or after March 1, 2005.
- B. What is the definition of an "estate" that is subject to a claim for recovery? The Medicaid agency will ask to be reimbursed from those assets that pass through a deceased person's probate estate. That is property that passes at death by a Will or, if no will, then by the laws of intestacy.
- C. What expenditures will the State recover? All expenditures arising from payments for nursing home, ICE-MR, home and community waiver services and the related costs of prescription drug services, medicals and hospital.
- D. Will the state place a lien on the homestead to secure its right to recover? No. Estate Recovery is a creditor rule that allows the state to make a claim against a decedent's estate just like the doctor, hospital, ambulance company or any other creditors.
- E. Are there any exemptions to estate recovery? Yes. There will be no estate recovery if the Medicaid beneficiary leaves:
1. a surviving spouse;
 2. a child under the age of 21 or a child of any age who is blind or disabled;
 3. an unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.
- F. If there is no exemption from Estate Recovery, then are there any other considerations? Yes. Certain defined persons can claim that estate recovery would be an undue hardship and ask the State to waive recovery. The following are the types of waivers that can be granted.
1. "The estate property subject to recovery has been the site of the operation of a family business, farm or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income."
 2. "Heirs and legatees would become eligible for public and/or medical assistance if a recovery claim were made."
 3. "Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance."
 4. "The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient," OR
 5. "Other compelling reasons."
 6. Waiver for the decedent's homestead.

G. How can one obtain a waiver from estate recovery for the decedent's homestead? The regulations setting out the homestead waiver are extensive but essentially may be granted to heirs or lineal descendants whose gross family income is less than three times the federal poverty rate (see Appendix III). The waiver will allow \$100,000 of the fair market value to be exempt from estate recovery for qualified claimants. If multiple heirs do not all meet the financial requirement, then only the qualified heir's or legatee's undivided interest can qualify for the undue hardship waiver. It will be interesting to see how the heir with the least income will be able to buy out the more prosperous heirs or legatees in order to preserve the homestead. As written, this rule has created significant obstacles to obtain a hardship waiver for married persons. By basing the hardship waiver on family income, the state is penalizing married persons and encouraging the break up of families to protect a right to inherit. Any person wanting to claim this waiver must provide the Medicaid agency with sufficient documentation to prove the family income. There may be heirs or legatees who do not want to reveal confidential information thus subjecting part of the homestead to estate recovery.

H. Are there any other limitations to obtaining an undue hardship waiver? Yes.

1. The Commission will not grant a waiver just because the person requesting it would lose an inheritance or legacy.
2. The Commission will deny a waiver if "the circumstances giving rise to the hardship were created by, or are the result of estate planning methods under which assets were sheltered or divested contrary to the requirements of Medicaid law in order to avoid estate recovery." This is a direct quotation from the rule. The meaning of this provision is unclear.

I. If there are no exemptions and no undue hardship waivers available, are there any deductions from Estate Recovery? Yes. There are deductions of direct costs of care that one paid that resulted in keeping the Medicaid recipient out of the nursing home and from maintenance of the homestead. "Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, home repairs, and home maintenance expenses such as lawn care." However, expenditures for taking care of your loved one's personal needs are not allowable deductions.

J. Are there any deadlines that will be applied? Yes. Once the Medicaid agency gives notice to whomever it chooses that it intends to recover from the decedent's estate, then a person has only 60 days to request a waiver and/or deduction, in writing, and provide all required documentation.

K. Can a person avoid estate recovery by giving away the decedent's assets prior to death? Remember, if a person intends to apply for or is receiving Medicaid assistance, the Medicaid agency penalizes transfers. For example, under today's rules, if a person gives away \$55,000, that person will be disqualified for Medicaid assistance for 13 months and 25 days. The disqualification period is calculated as follows:

$\$55,000 \div \130.88 (average cost of nursing home care) = 420.23 days (1 year, 1 month and 25 days)

L. What can a person do to protect assets such as the home or family farm? A person may be able to protect exempt assets such as a homestead, family heirlooms, or the family farm

but the rules are very complex. I urge you to talk to Ross & Shoalmire, LLP with your concerns.

12. What happens if both my spouse and I go into a nursing home and will probably not be able to come home. Will we have to sell our home or will the State of Texas place a lien on our home and foreclose on that lien?

Again, you should not have to sell your homesteads even if you go into a nursing home to live out your life. The State does not have the ability to place a lien on the homestead but, after you die, if there are no exemptions or waivers for your heirs, the State could require the executor of your estate to sell your assets in order to reimburse the State for the for the payments they made on your behalf. A person may be able to protect exempt assets such as a homestead, family heirlooms or the family farm but the rules are very complex. I urge you to talk to Ross & Shoalmire, LLP with our concerns.

13. Can I give away some of my resources (assets) in order to qualify for Medicaid?

Generally, no. If a nursing home applicant makes a transfer of resources for less than fair market value (a "gift") in order to qualify for Medicaid benefits, the applicant will be penalized for the gift by being ineligible for Medicaid benefits for a calculated period of time (the "transfer penalty"). The Medicaid Agency has determined that the average private pay cost for nursing home care is \$142.92 per day (beginning September 1, 2011 through August 31, 2012) for Texas and \$4,657.00 per month for Arkansas. To determine the number of months of ineligibility for any gift, the Medicaid Agency will divide the amount of the gift by \$142.92 or \$4,657.00 (depending on the state). The resulting quotient is the number of days/months of ineligibility for benefits.

If a gift is made, the presumption is that it was made in order to qualify for Medicaid benefits. The Applicant would have to prove that the gift was made for a totally different reason, which is a very difficult burden of proof.

Congress passed a new law that was effective February 8, 2006, called the Deficit Reduction Act of 2005. Texas Rules implementing the new law were effective October 1, 2006. Under the new law any period of ineligibility arising from gifts made after February 8, 2006, will begin on the date that a person would otherwise be eligible for Medicaid (usually the application date). Remember, a person does not apply for Medicaid until the person is in a nursing home with no more than \$2,000 in assets. If you have been gifting assets over period of months, you should contact Ross & Shoalmire, LLP about possible adverse effect of the new gifting rule.

Under old Federal and State law, the Medicaid Agency can "look back" for 36 months to determine if an individual made any gifts. Under the new rules that are effective October 1, 2006, the look back period will be 60 months.

14. Can I transfer all of my assets into a Trust and then apply for and qualify for Medicaid long term nursing home benefits?

Congress allows a disabled person under the age of 65 to transfer assets to a Supplemental Needs Trust drafted by an attorney or a Pooled Trust (e.g. the Arc of Texas, Master Pooled Trust) without transfer penalties. Bot of these trusts require that upon the death of the applicant/beneficiary, all Medicaid expenditures are paid back to the State out of the remaining funds. These trusts are generally irrevocable.

When spouses transfer their assets into a living trust, the Medicaid Agency takes the position that so long as the trust is revocable, it is as if the parties still own the assets—because the parties can revoke the trust at any time and get their assets back. There is no transfer penalty so long as the spouses can recover the property from the trust.

Effective December 1, 2006, a Medicaid applicant/recipient cannot claim an exemption for the homestead if the homestead is owned in a revocable trust. The Medicaid agency will allow a Medicaid applicant/recipient 60 days to transfer the homestead out of the revocable trust without the penalty.

Additionally, owning assets in a Revocable Trust can result in complications for Medical eligibility. When the first spouse dies, if the trust requires that the deceased spouse's property must pass into a trust for the surviving spouse, such a transfer could result in a Medicaid disqualifying transfer penalty applied against the surviving spouse (even if the decedent's trust for the surviving spouse had supplemental needs language). These rules are complex so before creating a trust with the intent of applying for Medicaid, a person should contact Ross & Shoalmire, LLP.

15. Can I put my assets in an annuity (sometimes referred to as a Medicaid annuity) and protect those assets from Medicaid scrutiny?

The answer is most often, No. An annuity that allows a person to access the cash assets (similar to a savings account) is a countable asset.

If the annuity is “annuitized,” the annuity will be paying monthly payments and the fund cannot be cashed out. If your annuity is paying monthly income with no ability to cash out the annuity, then you must name the State as either the secondary beneficiary with a spouse or minor child as the primary beneficiary OR name the State as the primary beneficiary. Upon the death of the annuity owner, the funds must pay to the surviving spouse, a minor child, or reimburse the state for all Medicaid expenditures made on behalf of the annuity owner.

Because an annuity contract could contain significant surrender penalties (over and above the tax issues), a person should contact Ross & Shoalmire, LLP to determine the pros and cons of investing in annuities.

16. I have a power of attorney for my loved one. Can I make small gifts in anticipation of applying for Medicaid benefits?

As noted, gifting can create a period of ineligibility for Medicaid long term care benefits.

This author advises against gifting for a number of reasons, including but not limited to:

- a. The Applicant cannot demand the return of the money, if needed (it was a gift, so the money is gone);
- b. The donee (person receiving the gift) may intend to keep the money and use it for the Applicant but what if the donee:
 - (1) dies before the Applicant.
 - (2) has creditors who can get the gift in payment of the donee's debt,
 - (3) has a spouse who spends the gift,

(4) spends the gift anyway.

While gifting is difficult, it may not be inappropriate. Any concerns about gifting should be discussed with Ross & Shoalmire, LLP.

17. What could happen if I use a power of attorney to make gifts of an elderly person's funds and someone complains?

There is a Texas Law that says:

“‘Exploitation’ Means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person Using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the Informed consent of the elderly or disabled person.” Texas Human Resources Code §48.002(3).

If Adult Protective Services (referred to as “APS:”) finds that a person used a power of attorney (or any other means) to transfer the Applicant’s money for the benefit, profit or personal gain of someone else (“make a gift”) without the Applicant’s informed consent, then APS could find that the person making the transfer has EXPLOITED the Applicant. Transfer of funds as small as \$500 can result in a state jail felony charge.

Therefore, it is imperative that if an elderly person intends to make gifts and may want to use the Medicaid program to help pay for care, then prior to the gifting, the elderly person or his/her family should consult with Ross & Shoalmire, LLP.

18. How can I learn the details about the Medicaid program?

When asking a legal question about the Medicaid program or any other legal issue, it is imperative that a person obtain advice from a competent attorney. Texas Law prohibits non-attorneys from advising persons about Medicaid qualification and charging fee.

a. A person who is not licensed to practice law in Texas commits an offense if the person charges a fee for representing or aiding an applicant or recipient in procuring assistance from the Commission [the Texas Health and Human Services Commission’s Medicaid program].

b. A person commits an offense if the person advertises, holds himself or herself out for, or solicits the procurement of assistance from the Commission.

c. An offense under this section is a Class A misdemeanor. Section 12.001 of the Texas Human Resources Code