

# Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ MARCH 2005 EDITION

## MEDI- MINUTES

### HHSC Proposes New Gifting Rules



As many of you know, there is presently a 3 year look-back period for any gifts or uncompensated transfers which could result in an ineligibility period for long-term Medicaid. Under the present rules, the penalty is determined by dividing the amount of the gift by the state-determined monthly average private pay cost of a nursing home (fractions are disregarded). Texas' present divisor is \$2,908 (it hasn't changed in about 3.5 years), and the actual monthly average in the Dallas area is probably closer to \$3,500-\$4,000.

Under the current rules, to determine the period of disqualification incurred by a gift of \$5,815, you must divide \$5,815 by \$2,908. This comes to 1.99, resulting in only one month of disqualification (the month of the gift, assuming no transfer penalty existed at the time). So, if one made a gift of \$5,815 on March 15, 2005 and there was no existing transfer penalty, then the ineligibility period would expire on March 31, 2005 at midnight. Thus, under the old rules one could make monthly gifts to reduce the countable resources (and obtain eligibility) almost twice as fast.

Under the new rule, however, the fraction is not disregarded. Therefore, if the gift of \$5,815 were made in March, the calculation would result in an additional month of ineligibility (eligibility beginning on April 30 instead of April 1).

If one had been making monthly gifts of \$5,815, the transfers would result in overlapping gifts, which would then be added together and divided by the average private pay cost of a nursing home. So, if one gifted \$5,815 for a year, then under the proposed new rule:  $\$5815 \times 12 = \$69,780/2908 = 23.99$  or 23 months and 30 days (instead of obtaining eligibility in 12 months as one would under the current rules).

It is anticipated that the divisor will increase at the time the new gifting rule becomes effective - which is expected around September 1, 2005.

Also, HHSC is taking the position that, if there is no gifting authority in the applicant's

power of attorney, such transfers will not be treated as gifts but funds held in constructive trust for the principal (thus resulting in ineligibility). Furthermore, transfers under the existing rule WILL NOT BE GRANDFATHERED. Bottom line: if one has been making monthly gifts, the plan and the applicant's power of attorney should be reviewed, especially if he or she plans to apply for Medicaid in the latter part of this summer or later.

## ESTATE TALK

### Estate Recovery Rules Become Effective as of 3/1/05

The final rules regarding estate recovery were published in the *Texas Register* on February 18, 2005. The final rules had only a few minor changes from the rules previously proposed and mentioned in the December issue of the *Texas Elder Law FaxLetter*. The estate recovery rules allow the state to make a claim against certain non-countable resources (most commonly, the homestead) that are in the applicant's probate estate at the death of the Medicaid recipient if the Medicaid applicant was over 55 years of age and INITIALLY (this word was added in the final rules) applied for covered Medicaid long-term care services on or after March 1, 2005, the effective date of these rules. As indicated previously, there are often planning techniques available to protect such non-countable resources. So, for example, if one enters a nursing home and obtains Medicaid benefits whereby the state helps pay for the cost of care plus medication, then the heirs run the risk of a loss of claim against the estate of the Medicaid applicant under the estate recovery rules unless proper planning has occurred.

Other changes include:

1. There will be no estate recovery if the value of the RECOVERABLE estate is \$10,000 or less (the word "recoverable" was added);
2. Certain notices are now 60 days instead of 40 days; and
3. Texas will be a creditor under Class 7 of the Section 322 of the Texas Probate Code (instead of being a guardianship creditor). Claims for funeral expenses, expenses of

administration and in preservation and management of the estate, expenses of last illness, secured claims, child support, certain taxes, penalties and interest, and even claims for cost of confinement for criminals will be superior to the claims of the state.

There are a few bills that could change (or even repeal) the estate recovery rules, so it is likely the estate recovery rules will not be implemented until the current legislative session is over - scheduled for the end of May 2005.

## E-MAIL VS. FAX

In the past, there has not been much demand for receiving this faxletter by e-mail rather than by fax. If there is large demand for e-mail, then this will be reconsidered. If you are interested in receiving this publication by e-mail rather than by fax, then please complete the following and return it to us by either fax at 214-754-0936 or by e-mail at [coeldlaw@flash.net](mailto:coeldlaw@flash.net)

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## NO FEB. FAXLETTER

Due the workload volume as a result of many rule changes connected with long-term care Medicaid, there was no February issue of the *Texas Elder Law FaxLetter*.

## OUT & ABOUT

Michael B. Cohen will be speaking at the Advanced Elder Law and Guardianship seminar sponsored by the State Bar of Texas on "How to Organize and Manage Your Elder Law Practice" on April 13, 2005 being held at Holiday Inn Select - Greenway Plaza in Houston, Texas.