

# Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ NOVEMBER 2004 EDITION

## STATE STORIES

### Income Cap to Rise

As many of you know, Texas is an income cap state in connection with long-term care Medicaid eligibility. Presently, if an applicant for nursing home Medicaid has "countable" income (certain income is exempt or excluded) over \$1,692 per month, the applicant is ineligible for nursing home or long-term care Medicaid. The income cap rises every January 1 with inflation. It is anticipated the income cap for year 2005 will rise to \$1,737 per month. Applicants for long-term care Medicaid can achieve eligibility even if their income is over the cap by either creating a qualified income trust (commonly known as a "Miller Trust" or as a "QIT") or by getting a court order to shift the income to the community spouse (if the applicant is married and such spouse lives in the "community" - i.e., at home), assuming all other Medicaid eligibility requirements have been met.



The qualified income trust or Miller Trust is the most common tool used to overcome the income cap. An income-only trust is established, and the income of only the applicant is placed on a monthly basis into the trust. Some or all of the income may be paid to the community spouse (if applicable) depending on his or her monthly income. The community spouse's income must be below the minimum monthly maintenance needs allowance, which is scheduled to rise from \$2,319 to \$2,377.50 per month on January 1, 2005.

If, however, there is a community spouse whose income combined with the pension income of the institutionalized spouse is greater than the minimum monthly maintenance needs allowance of \$2319, then it is often better to get a court order (qualified domestic relations order without a divorce) to shift more income to the community spouse. If the applicant is single, then the majority of the income from a qualified income trust will be applied to the nursing home and the government will subsidize the balance of the cost of care plus medication.

## MEDI- MINUTES

### Protected Resource Amount Increased

When one spouse applies for nursing home Medicaid (the "institutionalized spouse") and one spouse stays at home (the "community spouse"), the Texas Department of Health and Human Services (DHHS) takes a "snapshot" of the couple's countable resources (excluded items include pre-need funeral arrangements with waiver, homestead, one car, etc.). This "snapshot" is taken as of the first day of the first month in which the institutionalized spouse receives at least 30 days of continuous skilled care. That date determines the protected resource amount (PRA) for the community spouse. The PRA is the amount of countable resources that can be kept by the community spouse if there is no expansion as explained below.

The maximum PRA in Texas will increase from \$92,760 to \$95,100 as of January 1, 2005. However, as explained in previous issues of the Texas Elder Law FaxLetter, the community spouse can often expand the PRA if his or her non-investment or non-countable resource income is less than the minimum monthly maintenance needs allowance (MMMNA). This amount is presently \$2319 and is scheduled to rise to \$2377.50 as of January 1, 2005 if nursing home or hospital entry was prior to September 1, 2004. As reported previously in the Texas Elder Law FaxLetter, if entry in the hospital or nursing home was on or after September 1, 2004, then the non-countable resource income of both spouses must be below the MMMNA (presently \$2319) for there to be a possibility of expansion. On January 1, 2005, the minimum protected resource amount will also rise from \$18,552 to \$19,020.

To determine the PRA, calculate the couple's countable resources and divide that number by 2. The result is the PRA unless it is above the maximum PRA (\$95,100 as of January 1, 2005) or below the minimum PRA (\$19,020 as of January 1, 2005). Thus, DHS would allow the community spouse 1/2 of the couple's countable resources as of the snapshot date unless it is above the maximum PRA or below the minimum PRA.

For example, if the couple owns \$30,000 in countable resources, half that amount would

equal \$15,000. Since this is less than the minimum PRA, the PRA that could be kept by the community spouse would be \$19,020 in addition to the \$2,000 that could be kept by the institutionalized spouse, resulting in a total of \$21,020. The remaining \$8,980 would have to be "spent down" by paying debts, buying non-countable resources, or making limited gifts - unless the PRA is expanded (in which case all countable resources might be able to be kept by the community spouse without any change to such resources). This is permitted due to spousal prevention for impoverishment laws.

Similarly, if a couple has \$500,000 of countable resources, half that number would total \$250,000, which is greater than the maximum PRA of \$95,100. The PRA would therefore be \$95,100 and \$402,900 (\$500,000 - \$95,100 - \$2000) would need to be "spent down" prior to Medicaid eligibility, unless the PRA is expanded.

The PRA can often be expanded in Texas if the non-investment or non-countable resource income of the community spouse is less than the MMMNA. As indicated above, if nursing home or hospital entry (for 30 consecutive days) was prior to September 1 when Texas was a "resource first" state, the institutionalized spouse only diverts \$1 of his or her income to the community spouse, thus making it easier to expand and keep all of the resources for the community spouse while still achieving Medicaid eligibility. If nursing home or hospital admission was on or after September 1, then the non-countable resource income of both spouses must be considered. Expansion is based upon a formula which is interest rate sensitive. Thus, assuming the total non-countable resource income of both spouses is below the MMMNA, the lower the interest rate and the lower the non-countable resource income of the community spouse prior to September 1 (or both spouses on or after September 1), the more the PRA could be expanded without the necessity of any "spend down" as a result of spousal prevention of impoverishment laws.

## OUT & ABOUT

Michael B. Cohen was elected as the Vice-President of the Texas Chapter of the National Academy of Elder Law Attorneys at the September conference of such organization.