SAVING THE NEST EGG:

ASSET PROTECTION THROUGH MEDICAID PLANNING FOR LONG-TERM CARE IN TEXAS

Michael B. Cohen, Attorney at Law
12201 Merit Drive, Ste. 230
Dallas, Texas 75251
(214) 720-0102
Toll Free (800) 619-1587
Fax: (214) 754-0936

www.dallaselderlawyer.com

This booklet is for you:

- *You don't have adequate long-term care insurance and you want to protect your nest egg from the high costs of long-term care.*
- *You have a parent or spouse (or someone else) who is in - or is about to go - into a nursing home.*

(2017 update)

WE ARE EXPERTS IN ASSET PRESERVATION AND QUALIFYING FOR LONG-TERM CARE MEDICAID AND OTHER PUBLIC BENEFITS

MICHAEL B. COHEN is an elder law attorney who specializes in serving the needs of the senior community. He is a leader in providing planning services for:

ASSET PRESERVATION FROM LONG-TERM CARE COSTS

MICHAEL B. COHEN has been providing these services for over 20 years. The firm is proud to say that the majority of our clients are referred to us by our current and former clients and their families, estate planning attorneys, financial planners and other professionals that help seniors.

MICHAEL B. COHEN provides very specialized services in an area that banks, stock brokers, insurance agents and most attorneys, financial planners and accountants do not.

MICHAEL B. COHEN (and his staff) will become your partner in your quest to plan the best program for you and your family.

MICHAEL B. COHEN is accredited with the Department of Veterans Affairs.

In an independent survey by consumer and financial service professionals, MICHAEL B. COHEN was given a Five Star ranking in client satisfaction in the area of long-term care and Estate Planning in D/FW by *Texas Monthly.*

We would be honored to work with you.

CALL TODAY: (214) 720-0102

www.dallaselderlawyer.com

MICHAEL B. COHEN

ATTORNEY AND COUNSELOR AT LAW

The Dallas Elder Lawyer

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Dallas, Texas 75251
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Toll Free (800) 619-1587
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SUMMARY

Careful selection of a long-term care insurance policy is a reasonable option for many to provide peace of mind while permitting the passing of their estate to their heirs. However, often seniors cannot obtain such insurance and Medicaid may provide a safety net for them. Sometimes, one can purchase long-term care insurance yet still keep their Medicaid options open. The complexities of Medicaid (which often change), the existence of useful options and the potentially devastating financial impact of poor decisions makes it imperative that seniors receive good advice about their options from a professional who is well-versed in Medicaid and other public benefits laws, rules and regulations in their state (it should be noted that a non-attorney who helps an individual obtain Medicaid and gets any remuneration for such advice is in violation of a criminal act in Texas-not to mention, that is the unauthorized practice of law, if not under the direct supervision of an attorney). The planning process should give peace of mind to seniors and their families and give them some flexibility and control over events that occur.

This article is not a substitute for legal counsel prior to applying or planning for Medicaid, it is recommended that one seek legal counsel who specializes and is familiar with laws that affect elder Texans (the laws of each state differ). It is the goal of our firm to let people know what their options are (whether or not they seek public benefits) and for the client to make their own decision as to what is best for them. If you would like to schedule an appointment, you may contact us at (214) 720-0102 or at the email address of jennifer@dallaselderlawyer.com.

Let us take you by the hand and help lift the financial burdens from your shoulders!

INTRODUCTION

MICHAEL B. COHEN is an elder law attorney, whose Dallas law practice focuses on the legal needs of the elderly and/or disabled, including, without limitation, wills, trusts, powers of attorney, estate planning and long-term care Medicaid planning in connection with the protection of resources and income. He is a frequent speaker on estate and long-term care Medicaid planning.

MR. COHEN is a past president, officer, and member of the board of directors of the Texas chapter of the National Academy of Elder Law Attorneys. He is also a member of the Dallas Bar Association and the State Bar of Texas, and is Past Chair of the Dallas Bar Association's Probate, Trust & Estates Section and of the Solo & Small Firm Section.

He graduated Magna Cum Laude from the University of Texas at Austin (where he was a member of the honorary fraternity of Phi Beta Kappa) and from the Southern Methodist University School of Law.

WHY PEOPLE ARE INTERESTED IN MEDICAID

Americans are living longer than in the past - either due to diet, exercise or advances in medicine. As a result, the longer one lives, the greater the likelihood of disability - whether due to a fall or a stroke or a chronic illness such as Alzheimer's disease, Parkinson's, etc.

Many Americans are under the mistaken impression that Medicare will always take care of them - even if they are in a nursing home or other long-term care facility. Unfortunately, that is not the case. Long-term care insurance is a solution for many and is generally recommended (depending on health, age, assets and income of the potential purchaser and the purchaser's goals) for not only nursing home coverage, but assisted living and costs of staying at home as well. Others, may have enough funds to be self-insured. However, many do not medically qualify for long-term care insurance or it is too expensive - especially if it is not purchased until later in life. Additionally, many elderly Americans are concerned about quality health care, housing, medications and protecting their financial security (especially if their spouse has a high cost of care which jeopardizes the financial nest egg, even if small, that the couple has worked all their lives to accumulate).

As a result, many Americans have become interested in long-term care Medicaid since it may cover all or a part of the cost of care. Often the cost of care in the metropolitan area of Dallas is $5,000 to $8,000/month (sometimes more). Therefore, many of the elderly and their caregivers need to evaluate options regarding nursing home care, assisted living, long–term care insurance, in-home care and the public benefits (which could range from various Medicaid programs to Veteran's benefits) to which they may be entitled. Furthermore, Medicaid recipients need to consider protection of the homestead, a family business, etc. One of the most common statements this author hears is "I have worked all my life and always paid my taxes and now I want the government to assist in the cost of care, I want to save what I have accumulated for my benefit or pass what I have saved for the benefit of my spouse or other heirs."

IRREVOCABLE LIVING TRUSTS

Irrevocable Living Trusts also can also be used in estate planning for many different reasons. Sometimes they are used to preserve assets for a mentally or physically disabled minor or adult child. If they are not done properly they can, in fact, cause complications when trying to qualify for Medicaid for long-term care costs. One issue that most people are familiar with is the "look back" period. Generally, the "look back" period for most Irrevocable Living Trusts is 60 months, or 5 years. We would be happy to review your trust and let you know how it might affect any of your entitlement benefits.

LONG-TERM CARE INSURANCE

Long-term care insurance is a great way to pay for nursing home, assisted living and at-home care expense. Unfortunately, too many people either don't have it, or they are underinsured, or don't have a large enough policy. Long- term care insurance is designed to pay for the daily costs of care in a nursing home (and sometimes assisted living and home care). The best policies pay for everything. There are, however, many different types of long-term care policies, with many different levels of benefits. Many families find that even with a long-term care insurance policy, there is still a significant shortfall between what the bill is and what the policy will pay. Medicaid can sometimes pay some or all of the difference. So, even though you or your loved one may have a long-term care insurance policy that doesn't completely pay the nursing home bill, you may possibly still receive assistance. Give our office a call, and we will be happy to explain your options to you.

It should also be mentioned that Texas will soon be implementing a partnership program whereby resources can be protected if the applicant buys an appropriate long-term care insurance policy.

REVOCABLE LIVING TRUSTS

Revocable Living Trusts are often valuable in estate planning - but are often a hindrance to Medicaid eligibility since resources placed into the trust still generally count as a resource. Further, even if you obtain Medicaid eligibility with the trust, eligibility could be lost at the annual re-certification if it is a joint living trust (husband and wife) since the resources held in the trust would be considered available to the Medicaid recipient. The other problem with a joint living trust is that ineligibility would result if the community spouse dies first. Furthermore, if you place your homestead into a Revocable Living Trust, the resource treatment changes from non-countable to countable.

Sometimes Revocable Living Trusts can be useful for Medicaid planning - especially in avoidance of estate recovery.

WHAT DOES MEDICARE PAY?

Medicare is a federally funded healthcare insurance program that pays allowable medical expenses for enrollees (65+, eligible for Social Security and enrolled in Medicare or those who have been on Social Security Disability for 2 years). Medicaid is a tax-supported entitlement to anyone of age that meets the state medical and financial eligibility requirements. If a person who has Medicare is in a hospital for 3 days/nights, Medicare will pay 100% of charges for skilled nursing care for the first 20 days. Thereafter, generally for rehabilitation, the patient has a co-payment of $164.50/day (2017) for days 21-100 and Medicare pays the difference (which is not guaranteed - only as long as there is progress). If one has a Medicare supplement, then the co-payment would be covered. There is no Medicare coverage after the 100th day. This generally leaves Medicaid, long-term care insurance and private pay to cover the cost of long-term skilled nursing care.

LONG-TERM CARE - MEDICAID'S INCOME TEST

If an individual seeking long-term care Medicaid eligibility has gross income (typically, Social Security or pension income) greater than the cap or if both members of a married couple seek eligibility and the combined is more than double the income cap, then there is ineligibility for Medicaid unless a "Miller" or "qualified income" trust is created. As of January 1, 2017, the monthly income cap is $2,205 for one person applying and $4,410 for a married couple, both seeking Medicaid. **If the Medicaid applicant's income is more than the limit, please give us a call so we can explain your options.** If there is a community spouse, there may be a diversion of income from the institutionalized spouse to the community spouse up to the minimum monthly maintenance needs allowance-"MMMNA" - ($3,022.50 in 2017).

RESOURCE (ASSET) TEST

Since Medicaid eligibility is means-tested, all resources of the applicant and their spouse (if applicable) must be disclosed. Some resources count and others do not. Examples of countable resources in Texas include all checking accounts, savings accounts, IRAs (certain exceptions apply), cash surrender values of most life insurance policies, all deferred annuities and some immediate annuities, most real estate (other than the homestead and certain business property such as the family ranch or farm treated as a business), CDs, investment accounts, savings bonds, etc. A single person can only have $2,000 of countable resources. However, the applicant can have the resources as mentioned in the section entitled "Exempt Resources" which will not count. Like tax planning, Medicaid planning can be utilized to shift the burden of the cost of care and further to protect certain non-countable resources from the claim of the state after the death of the Medicaid recipient. So, some applicants simply purchase non-countable resources with countable resources (although often that is not the best answer).

Q. My spouse/parent/loved one, is already in a nursing home. Can I still apply and qualify for Medicaid?

A. YES!!! Medicaid is needs based. This means that you have to need the help in order to begin the process of qualifying for it. If you are paying privately for long-term care, you definitely need to give our office a call, TODAY, before it's too late!

Q. If I already have a long-term care policy, will I still need Medicaid?

A. Possibly. We encourage everyone to start looking into purchasing a long-term care policy by the time they hit age 55. Most of my clients, however, either don't have it, or can no longer qualify for it due to health concerns. Even if they can still qualify for a policy, they may not be able to afford the premium because of their age or health when they bought it. Due to this, they may have bought a "stripped- down" version. These limited plans often don't pay the majority or the costs of the long-term care facility.

Q. My friends or family told me that I have too much money for Medicaid. How can Michael Cohen help me?

A. There is not just one simple answer to this question, since each person's situation is unique. We are able to help nearly everyone who comes to us for assistance. Remember, unless your friends, bankers, stock brokers, and attorney's work in the field of Medicaid qualifying on a daily basis, they probably aren't the sources that you should rely on for "expert" advice! Of course, non-attorneys are unable to give legal advice, as that would be unauthorized practice of law, unless they are supervised by an attorney. Don't let your "advisors" discourage you from getting accurate information!

Q. Do the accounts that I own jointly with someone else count toward my Medicaid eligibility?

A. It is assumed that the account belongs to the applicant unless it could be proven otherwise.

Q. Do the assets of the community spouse count even if there is a pre-nuptial or postnuptial agreement?

A. Yes.

Q. Is buying an annuity the best way to protect all of my resources?

A. It depends on the factual situation. Generally, if the community spouse has income around $3,022.50, then a Medicaid annuity becomes more of a consideration.

Q. Who handles all of the Medicaid paperwork? I don't think I would understand most of the questions on all those forms?

A. No problem, Mr. Cohen's office handles ALL of the Medicaid paperwork for you. We complete the forms with information that you supply to us. We know what the questions mean and how best to answer them. LEAVE THE PAPERWORK TO US!

Q. Can the community spouse keep several hundred thousand dollars and still get Medicaid eligibility for his/her wife/husband without having to change the nature of his/her resources?

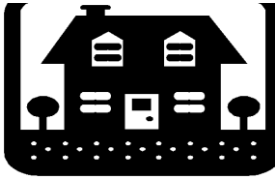
A. Depending on the income of the community spouse and other factors, often the answer is <u>YES</u>!

UNDERSTANDING THE MEDICAID "SPEND DOWN"

Resources are counted as of 12:01 a.m. of the 1st day of the 1st month in which the person is institutionalized for 30 or more consecutive days. Generally, all resources count (except the resources listed on the following page). If you are single, you can only have $2,000 of countable resources if you apply for long-term care Medicaid as mentioned. If both members of a married couple apply for Medicaid, then only $3,000 or $4,000 can be kept of countable resources. If there is a spouse that stays at home (the "community spouse"), then there is a determination of the "PROTECTED RESOURCE AMOUNT" ("PRA") - which is the amount that can be kept by the community spouse (unless there is an expansion of the PRA). The maximum PRA (as of 2017) is $120,900 BUT OFTEN MORE CAN BE PROTECTED especially if the non-countable resource income of the couple is lower than the "MMMNA" of $3,022.50, and it should be noted that the PRA is calculated by dividing the countable resources (as of the 1st day of the month of continuous institutionalization) by 2 not to exceed $120,900 unless the PRA is expanded. So, if non-countable resource income of the couple is greater than $3,022.50, the community spouse might not be able to keep up to the maximum PRA as the community spouse could only keep 1/2 of the countable resources.

EXEMPT RESOURCES

A single person who applies for long-term care Medicaid can only have $2,000 (in addition to exempt resources) on the 1st day of the month. The amount a married couple can keep depends on whether only one or both applies and whether "non-countable" resource income (i.e., Social Security and pension) is lower than the MMMNA. The lower the income of the couple, the more resources that can be protected.



Primary Residence: Equity up to $560,000. This applies to single person only (no limit for married couple). This does not exempt the home from recovery after death. There are other protections available.

Automobile: One only (generally), even if the person is not driving it. Single or Married: no limit on value of car.

Certain other items may also be exempt if they are within certain defined limitations; or if they are structured correctly, including, but not limited to: personal property, jewelry (wedding ring and engagement ring), and furnishings.

Certain burial plots and burial expense plans (fully paid and irrevocable) do not count.

Life insurance policies (up to $1,500 cash value only), certain annuities, mineral interests (<$6,000) that generate a 6% rate of return, and business property are also exempt.

Transfers for less than fair market value on or after 2/8/06 are subject to a 5 year look-back period. For such transfers on or after 2/8/06, the transfer penalty period resulting in ineligibility for long- term care Medicaid starts from the date of application or from when one is otherwise eligible for long-term care Medicaid (unlike the pre-DRA rules where the transfer penalty starts from the 1st day of the month of the transfer for less than fair market value). Under DRA, the presumption is that any uncompensated transfer (even a gift to a charitable organization) within the 5 year look-back period was done for the purpose of obtaining Medicaid benefits. So, under DRA, if you made a gift to a charitable organization and 4 years later you had a stroke and applied for Medicaid, the presumption is that the gift 4 years earlier was for purposes of obtaining Medicaid and the period of ineligibility would start when such person applied (assuming it was within 5 years of the uncompensated transfer) and is otherwise eligible for long-term care Medicaid and not from when one made the transfer. Notwithstanding DRA, there are still planning strategies presently available for asset preservation - even for transfers within the 5 year look-back period. The transfer penalty (representing the average cost of a nursing home in Texas) is $172.65 (as of 9/1/17).

Q. Can't I always transfer $10,000 to my children?

A. See above. The annual exclusion (which is now $14,000 as of 1/1/13) is still subject to the Medicaid rules. So, the transfer could result in a transfer penalty-depending on when the uncompensated transfer was made and if there was an existing transfer penalty or if it met one of the exceptions to the rule. So, one can give away $14,000 annually per done and not report to the IRS (for gift tax purposes), but such person would be subject to the Medicaid transfer penalty rules.

Q. If we get my loved one on long-term care Medicaid, are we going to lose the family home?

A. In Texas, the state has a right to make a claim against the probate estate of the Medicaid recipient to the extent that Medicaid benefits have been advanced if the Medicaid recipient applied for Medicaid on or after 3/1/05. There are several exceptions to the rule. Presently, there are also several planning methods to avoid the claim of the state against the home (not to mention other non-countable resources such as car and a business).

Q. Does Medicare pay for long-term care?

A. Medicare pays for a limited amount (maximum 100 days if there is a Medicare supplement policy) of rehabilitation or therapy if there was at least a 3 day hospitalization. This leaves either private pay, long-term care insurance or Medicaid, generally, for long-term coverage costs.

Q. My attorney prepared a Living Trust and I was told that protected my assets from long-term care costs - isn't that correct?

A. No, in fact, sometimes it actually places the applicant in a worse position if they place their home in the trust. The living trust is usually designed to avoid probate. The living trust doesn't protect assets from spend down.

Q. Can I transfer or give away my assets to obtain long-term care Medicaid?

A. A transfer of assets can result in a penalty causing ineligibility for long-term care Medicaid. There are some exceptions to the rule (particularly with regard to disabled children). As a result of the Deficit Reduction Act of 2005 ("DRA"), the rules regarding transfers for less than fair market value have changed for transfers that occur on or after 2/8/06.

COUNTABLE RESOURCES

Cash: Countable. Even if your children's names are on the accounts, it will still all be counted as yours (unless you prove it is children's)!

Automobiles: Most second cars, recreational vehicles, etc. They usually should be sold, or otherwise they can disqualify you*. The funds from sale can be converted into "exempt" resources.

Stocks, Bonds & Mutual Funds: These liquid assets must be "spent down" to acceptable limits; or converted to "exempt" resources*.

Real Estate Other Than Homestead: If sold, funds must be converted to an exempt account that is structured correctly*.

All Other Cash Accounts: The combined total of all (checking, savings, CDs, deferred annuities, improperly annuitized annuities, money market accounts, 401k, IRAs, cash value in most insurance policies, etc.). However, sometimes 401Ks, IRAs, SEPs, and ROTH IRAs are not-countable.

**** Except where the non-countable resource income of a married couple is low enough.***

TRANSFER OF RESOURCES

Because Medicaid is means-tested, it is assumed that if an applicant gives away a resource for less than fair market value that it was done to try to qualify for Medicaid. Unless it meets an exception to the rules, the applicant is penalized if the transfer was made within the look-back period. Prior to the Deficit Reduction Act of 2005, signed on 2/8/06, the "look-back" (the period before one applies) was 36 months on gifts (uncompensated transfers) and 60 months on uncompensated transfers to most IRREVOCABLE trusts (there are a couple of exceptions). The DRA changes the look-back period to 5 years on all transfers for less than fair market value and the date when the transfer penalty begins (now from the month of application or when the applicant is otherwise eligible). For transfers before 2/8/06, the penalty start date was from the date of transfer. To determine if there is Medicaid ineligibility, the amount of the uncompensated transfer is divided by the average daily private pay cost of a nursing home in Texas ($172.65 as of 9/1/17). EVEN GIFTS TO A CHARITABLE ORGANIZATION OR CHRISTMAS GIFTS, ETC., POSSIBLY COULD RESULT IN A TRANSFER PENALTY (depending on the facts).

FREQUENTLY ASKED QUESTIONS

Q. Do I make too much money for Medicaid?

A. There are several different Medicaid programs and the income cap may vary by program. For long-term care Medicaid, the monthly income cap is $2,205 (as of 1/1/17). There is more than one solution to the problem. A common solution is a "Miller Trust".

Q. Do I place my assets into a Miller trust?

A. No.

Q. Will I, as the spouse that lives at home (the "community spouse"), be allowed to keep any of my spouse's income if such spouse lives in a nursing home (the "institutionalized spouse") and is on Medicaid?

A. It depends on the income of the respective spouse and what strategy is employed. If the income of the community spouse is greater than what is called the minimum monthly maintenance needs allowance, the "MMMNA", ($3,022.50 as of 1/1/17), then there are limited situations when a court order can be obtained to divert income from his/her institutionalized spouse so that his/her income is above the MMMNA. If there is a "spend down" of countable resources, then there can be a diversion of income to the community spouse so that the community spouse has income up to the MMMNA. However, it is often best to not "spend down", so this situation must be carefully reviewed with your experienced elder law attorney. There is no limit to income of the community spouse – there is just a limit as to how much can be diverted from the institutionalized spouse.