The Ultimate Guide To
PAYING FOR NURSING HOME CARE
IN NORTH CAROLINA

# How to Avoid Nursing Home Poverty And Save Your Family Thousands

**REVEALS:**
The Nursing Home and Medicaid Secrets
You Need to Know to Avoid Going Broke
in a Nursing Home and
Leaving Your Family Penniless

North Carolina
Long-Term Care Planning Attorney
**JACKIE BEDARD**

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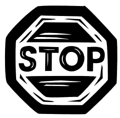
# Introduction:
# Why Should You Read THIS Book?

Contrary to what many ads might have us believe, getting older isn't always a walk in the park. If you are like most people, you worry about how the costs of a potential nursing home stay will impact you and your family. You have questions. You've talked to friends, neighbors or relatives about your concerns and just wind up more confused.




***DID YOU KNOW?***

***93% of all Americans are only a single event away from losing their home and money to a catastrophic illness.***

***This may surprise you, but according to AARP, 70% of individuals who have reached age 65 will live in a long term care facility for a period of time (an average of 2.2 years for men and 3.7 years for women).***

The average cost of care today ranges from $5,000 to $10,000 per month, per person. That's an average cost of $60,000 to $120,000 per year! At this rate, the average middle class family would go broke in less than 2 years!

The sad reality is this: what you intended to go towards your happy golden years and a legacy for your family ends up going to a nursing home. But armed with the information in this report, you'll know what you need to do to protect your home, preserve your life savings and qualify for Medicaid without going broke.

## Read Inside to Learn How to Protect Your Family

Discover:

- Why you won't hear the details of this report emphasized by any caseworker or nursing home employee
- Why it is so important that you understand the Medicaid rules and use them properly
- How Medicaid could force your family to sell your home
- Why one small mistake could make you ineligible for benefits for months or years longer than necessary
- Why giving everything away to the kids can sometimes be one of the WORST planning techniques
- Why starting to plan sooner can save your family substantially more (but even if your loved one is already in a nursing home, it still may not be too late to save money)

## Why I Wrote This Book

Simple. I'm tired of seeing people unknowingly harming their chances to receive financial assistance for nursing home expenses before they have a chance to talk to an attorney.

I am also tired of hearing the on-going myths and misperceptions surrounding paying for nursing home care. You know the type—"I heard from a friend, whose neighbor said that their mother just did (fill in the blank) and she received benefits in no time!" I call that the "coffee shop and hair salon law". And most of the time, it's just plain wrong and could lead to disastrous consequences.

I wrote this book so that you could have good, honest, useful information to review and study in the comfort of your own home.

No Hype.

No pressure.

Frankly, this book also saves me time. I get many calls each month from people asking questions regarding nursing home expenses. I've packed a ton of information into this book and it saves me many hours each month by not having to talk to all of the potential clients who call me. I can't accept every client. If I gave a "free consultation" for each new potential client that called our office, there simply would not be enough time to get any work done and it wouldn't be fair to my existing clients.

Writing this book gives me a chance to "talk to you" about what you need to know about planning for nursing home costs so that you can make an informed decision about what steps to take with *your* planning. Even if you do not ultimately become my client, I would like you to be educated about the process so you don't fall victim to losing your hard-earned life savings to the devastation of constantly rising nursing home expenses.

## Disclaimer: This Book is NOT Legal Advice

If you become my client, then we will be in this together. I am not allowed, however, to give legal advice in this book. I can offer suggestions and identify traps for the unwary, but please do not construe anything in this book to be legal advice about your case until you have agreed to hire me AND I have agreed, in writing, to accept your case.

This book is intended to explain the legal dilemmas for families facing potential nursing home expenses. It is not intended as a do-it-yourself manual, nor should it be considered a substitute for professional legal guidance.

Throughout the book you will see references to various Medicaid and Veteran's Administration numbers, figures and rules. It is important to understand that these numbers are adjusted periodically and that the interpretation of various rules is subject to change. Please see the back of this book for our most recent updates regarding the appropriate figures. And while we try to keep this book updated with the most recent facts or figures, you should always consult with your elder law attorney to verify that you have the most up-to-date information.

For advice regarding your specific circumstances, you should always consult with a qualified elder law attorney in your state of residence.

# Chapter One:
# Myths You Might Have Heard from Friends, Neighbors and Relatives

## Medicaid Myths That Could Cost Your Family Thousands

### Myth #1: “They” Will Take My Home.

**False.** The Medicaid rules allow you to own certain amounts and types of property and assets and still qualify for benefits, but you must understand the Medicaid rules and what is permitted. Generally, the rules permit a Medicaid applicant to exempt a home with equity of up to $500,000 and still be eligible for benefits. But be aware of Medicaid Estate Recovery! What is more likely to happen, is that when you have passed away (or, if you are married, after both you and your spouse have passed away), Medicaid will take control of your home and force the sale of the house. Then, the money from the sale of the house must be used to repay Medicaid for the benefits that it provided to you during your lifetime. We’ll talk about this more later, but it’s important to obtain proper legal advice regarding how to best protect your home or it could wind up subject to Medicaid Estate Recovery upon your death.

## Myth #2: I Can Just Give Away All Of My Assets To My Children And Still Get Qualified For Medicaid.

**False.** Regardless of the reason for a gift, the Medicaid laws assume that the money or assets were given away to qualify for Medicaid. When you apply for Medicaid, they are going to look at all gifts and transfers you made for the past 5 years! And after totaling up all of the gifts and transfers that you made, the Medicaid office is going to calculate an ineligibility period. That is, they are going to punish you for making the gifts. If you are considering making such gifts and may apply for Medicaid in the future, then it's absolutely critical that you consult with an elder law attorney that can help you reduce or eliminate such penalty periods by providing proper guidance as to how to best qualify for Medicaid benefits.

## Myth #3: I Have to Wait 5 Years After Gifting Or Transferring Assets Before I Can Qualify For Medicaid.

**False.** When you complete your Medicaid application, the Medicaid office has the right to review your financial records for the past five years (this is known as the 'look back period'). Many people mistakenly assume that this means if there any gifts or transfers within that 5 year period, that they will be ineligible. This is not true. However, if there have been any gifts or transfers, they may result in a penalty period, but the length of the penalty period is based upon the size and character of the gift or transfer. Again, if you're considering making any gifts or transfers, I urge you to consult with an elder law attorney to make sure your plans aren't going to backfire in the future.

## Myth #4: I Can Qualify For Medicaid Immediately If I Transfer All Of My Assets To My Spouse.

**False.** The Medicaid office looks at the assets of <u>both</u> spouses in determining eligibility. Not only are there limits as to the amount of assets that the sick spouse can have, but there are also limits as to how much the healthy spouse can have.

## Myth #5: I Can Give Away Up to $13,000 Per Year.

**False.** This myth comes about because many confuse the IRS tax rules with the Medicaid rules. The tax laws permit a person to gift up to $13,000 per person without owing any gift taxes. BUT, that has nothing to do with Medicaid! For Medicaid purposes, this is still considered a gift that will trigger a penalty period.

## Myth #6: The Healthy Spouse Gets To Keep Half Of The Assets.

**False.** While this might be true for some couples, as a broad statement it is incorrect. As of the day that an ill spouse enters the nursing home, the healthy spouse is allowed to keep one-half of the assets, but that one-half cannot exceed $109,560. Thus, for many people, this statement proves to be false.

## Myth #7: I Won't Qualify For Medicaid Because I Have Too Much Money.

**False.** You don't have to be broke to receive Medicaid. An elder law attorney can run a Medicaid analysis with you and discuss whether planning is right for you. If appropriate for your situation, the attorney can advise you how to arrange your assets in accordance with the Medicaid rules such that you can get qualified as quickly as possible while potentially saving your family a great deal of money.

## Myth #8: My Financial Advisor Said I Can Just Use An Annuity To Qualify For Medicaid.

**False.** An annuity contract is a countable asset for eligibility purposes. The truth is that most financial advisors don't understand the Medicaid rules. While this technique may have worked in the past, major changes to the Medicaid rules were passed in 2006 that substantially changed the use of annuities in the Medicaid rules. The

Medicaid rules do have a very narrow exception that allows a certain type of annuity to be used in the Medicaid planning context, but it is NOT the type being sold by your most financial advisors. Please seek the advice of an elder law attorney to review any financial product that claims to be a Medicaid-qualifying annuity. [And as a side note, there are also many advisors that sell annuities for purposes of qualifying for the Veterans Administration's Aid & Attendance program - a great program for war-time veteran's by the way. See our website for more information! While those annuities might work for VA purposes, when not handled correctly, they can cause major problems down the road if you ever apply for Medicaid.]

## Myth #9: I Should Let The Nursing Home Employee Or Social Worker Complete My Medicaid Application.

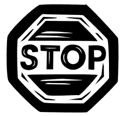
**False.** Do NOT let a nursing home employee or case worker complete your Medicaid application. Filing the application at the wrong time or with the wrong information can be catastrophic. Both the nursing home and the Medicaid department just want you to complete the application as quickly as possible. This will usually result in unnecessarily spending almost all of your money on nursing home expenses before you can receive Medicaid benefits.

## Myth #10: I Should File My Medicaid Application As Soon As Possible.

**False.** Applying too early can be a very costly mistake if gifts have been made that impact eligibility! Depending on the size and timing of gifts and transfers, applying at the wrong time can potentially be disastrous. I heard a story once about a professional accountant and his mother. Rather than hire an elder law attorney, he decided to go the Do-It-Yourself route. He read about the Medicaid rules and planning techniques. He thought he understood them and he transferred $500,000 to an irrevocable trust. He began paying for his mother's care through what he thought the ineligibility period was, and then he filed the Medicaid application. But it turned out that the application was not submitted at the right time. As a result, his mother had to start a new ineligibility period (in this case, a period of 100 months due to the size of the transfer!). This is an easy mistake to be made by someone that does not work in the area of Medicaid. Of course, filing too late can also cost your family thousands in lost benefits, so it is critical to apply at just the right time.

# Chapter Two:
# Medicare, Medicaid, Medi-WHAT???

Before we dive into the Medicaid rules and planning options, let's pause to clear up some confusion regarding Medicare and Medicaid.




> ***CAUTION!!!***
>
> ***DON'T fall victim to the belief that Medicare will pay for your long term care.***
>
> ***This is a HUGE mistake that winds up costing many families THOUSANDS of dollars unnecessarily!***

A lot of people confuse these programs. Even the names are confusing because they sound so similar!

An even bigger issue is that many people falsely assume that Medicare will take care of them as they get older. But that's not how it works.

Medicare and Medicaid are two entirely different programs. Medicare is an insurance program that provides health care benefits to persons who are over the age of 65, or are blind or disabled. For recipients, it is basically their primary form of health insurance. But what many seniors fail to understand is that Medicare does NOT pay for long-term care expenses!

Part of the reason for the confusion is that Medicare does pay for *rehabilitation*. If a senior on Medicare has a hospital stay of at least three days and then is admitted to a Skilled Nursing Facility for rehabilitation, Medicare will pay for the care—for a while anyway. Medicare will only pay for the rehabilitation for a maximum of 100 consecutive days. Plus, once those days are used up, they're gone for good.

Did you notice that I said a "maximum" of 100 days? That's because it's actually based upon how well the patient responds to the rehabilitation. The patient must experience some improvement. If the patient's health is not improving, Medicare may decide that the condition is long-term and benefits will be cut off—even if you haven't reached 100 days yet.

Another thing that most people don't realize is that Medicare only fully covers the first 20 days. After that, there is a daily deductible of about $140 per day! So a 100 day stay could still end up costing you over $11,000! [If you have a Medicare Supplemental Insurance policy, it might help cover some or all of the difference.]

As I mentioned, Medicare is really only concerned with rehabilitation—are you able to get better? Many diseases, such as Alzheimer's and dementia, have no known cure and there is no possibility of rehabilitation. The bottom line is that Medicare is NOT going to provide you with nursing home care if you have Alzheimer's, dementia, Parkinson's, or other similar diseases.

Now let's talk about Medicaid.

Very few people have had to deal with the Medicaid rules. Medicaid is paid for by both federal and state funds. The Medicaid rules come from federal law that is "administered" at the state level. As a result, the rules vary from state to state, and sometimes interpretations of the rules can even vary from county to county.

Medicaid is a needs-based program that will pay for long-term care and medications, but you must not exceed certain income and asset limits in addition to also being deemed medically in need of the services.

To recap, here is a summary of the two different programs:

### *Medicare*

- Health insurance program for seniors age 65+
- Pays for no more than 100 days of nursing home care
- Pays for primary hospital care and related medically-necessary services
- You must have contributed to Medicare system to be eligible and generally must be over age 65

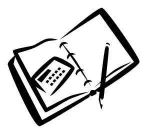
### *Medicaid*

- Needs-based health care program
- Controlled state by state, which creates different regulations in each state of application
- Pays for long term care and medications
- You must meet income and asset limits to be eligible
- You must be over age 65 and disabled or blind

# Chapter Three:
# Medicaid??!! Isn't that just welfare?

Perhaps you've heard Medicaid referred to as a last resort. That is, after you've gone broke paying for long-term nursing home care, you can apply for Medicaid to provide financial assistance in paying for your care. Or maybe you just thought it was a program for those that are too poor to pay for their care.

Congress created the Medicaid program to protect certain individuals—including providing financial assistance to seniors who require long-term nursing home care. Nursing home expenses can run $5,000 to $8,000 per month or more depending on the facility and the level of care needed. This can rapidly eat away your life savings within months. But did you know that with proper planning, you might not have to go broke paying for nursing home care?



***QUICK FACT:***

***It's estimated that 40-50% of nursing home expenses are paid for by Medicaid. Furthermore, more than 60% of nursing home residents receive some form of assistance from the Medicaid program.***

First, let's back up and make sure we are clear on just what Medicaid is. It's a public assistance program that will pay nursing home expenses for individuals that qualify for the program. In very limited circumstances, Medicaid might cover some limited in-home care or community-based services, but generally, it's used to pay for long-term care once a person has "run out of money" (we'll talk more about that later).

The Medicaid program was created by federal law, but is administered by each state. The federal government provides grant money to each state that covers part of the cost of the program and the state picks up the rest of the tab.

Each state then has its own rules and interpretations when it comes to administering the Medicaid program, although they have to stay within the parameters set out by the federal Medicaid laws. So you'll find that the Medicaid laws vary from state-to-state. Sometimes they even vary a bit from county-to-county!

To recap, Medicare is an insurance program that you qualify for automatically when you reach a certain age. Medicaid is a need-based program. Its intent is to help pay for care for those that cannot afford to pay for their care.

Contrary to what many people believe, Medicare coverage will not pay for most of the long-term care they will need if they suffer from a long-term illness. The reality is that Medicare only ends up covering about 7% of nursing home expenses in the country. Medicaid, on the other hand, pays about 50% of the nursing home expenses in the US.

Unfortunately, the Medicaid laws are complicated. Many say that they are more complicated than the tax laws! And very few attorneys and advisors truly understand the Medicaid rules.

Don't waste your life savings making Medicaid mistakes! Later in this report, you will discover how to avoid some of the most common pitfalls that cause people to lose thousands of dollars.

# Chapter Four:
# Determining Level of Care

Before we actually dive into the various payment options when it comes to nursing home care, we need to take a brief detour and define what exactly "nursing home" care is for the context of most of this book.

The majority of this book is going to focus on the legal and financial requirements for qualifying for financial assistance to cover the cost of care via Medicaid, but before we get there, we need to briefly discuss what levels of care qualify for assistance.

## Activities of Daily Living (ADLs)

In the health care world, an individual's ability to engage in the "activities of daily living" is used as a metric for determining the level of care that an individual needs. The basic Activities of Daily Living are:

- Personal hygiene and grooming, including bathing
- Dressing and undressing
- Self-feeding
- Functional transfers, such as getting from bed to wheelchair or getting on or off of toilet, etc.
- Using the toilet
- Ambulation, i.e., walking without the use of an assistive devise (such as a walker, cane or crutches) or using a wheelchair

## Adult Care

As a rough rule of thumb, people needing assistance with only one of above the ADLs are considered at the "Adult Care" level, and are likely to still be receiving care at home or from a loved one or using the services of an adult day care facility.

## Assisted Living

Those needing assistance with two ADLs are deemed needy of "Assisted Living" level of care. An individual at the "Assisted Living" level of care is likely either at home with the assistance of a family member or home nurse health support or they may be living in an Assisted Living Facility.

## Skilled Nursing Facility (a.k.a. a "nursing home")

Finally, those needing assistance with three or more of the ADLs are generally going to be deemed in need of chronic care, and are likely to need care in a Skilled Nursing Facility - commonly referred to as a "nursing home."

## Special Care Unit

Occasionally you might also hear the term "Special Care Unit." This is typically in reference to a specific building or wing of a facility providing care to those with Alzheimer's and dementia.

# Chapter Five:
# Paying for Care While Living at Home in North Carolina

As we've already discussed, *Medicare* does not pay for home health aides that are providing custodial care such as bathing, dressing, grocery shopping, etc. The Federal Medicaid laws, however, do permit states to have a waiver program. Through these waiver programs, Medicaid may cover certain custodial services that enable an individual to continue residing at home or in an adult care facility.

## Community Alternatives Program for Disabled Adults

Here in North Carolina, the program is known as the Community Alternatives Program for Disabled Adults (CAP-DA). To be medically eligible for the program, a person must require nursing home level care or be at risk of nursing home placement if they don't receive the community-based care.

The financial eligibility rules for the CAP-DA program differ from the regular Medicaid rules in a few ways. For example, eligibility is determined by considering the income and assets of the individual only (not the spouse or other family members). The full eligibility rules of this program are beyond the scope of this book.

If a person qualifies for the CAP-DA program, it will cover such things as adult day care, more extensive home care (but not 24 hour care), and supplies such as incontinence products and nutritional supplements.

## State/County Special Assistance Program

The State/County Special Assistance Program (or commonly just referred to as "Special Assistance") is a program in North Carolina funded by state and county funds that may cover cost of care in certain circumstances. The financial eligibility rules are more stringent than the Medicaid rules, however, making it more difficult to qualify for Special Assistance. For example, for home-based care, there is a firm income limit of $1,272.50 per month. If the person is in a Special Care Unit (typically a specially designated Alzheimer's or dementia ward), then this limit is increased to $1,580.50. An individual with income exceeding this limit will be ineligible for Special Assistance.

## Veteran's Aid and Attendance Program

The Veteran's Administration (VA) has a little known special pension program, more commonly referred to as the "Aid and Attendance Program" to help offset the cost of care. For those that meet the eligibility criteria, the program provides benefits for veterans, their spouses, or the surviving spouse of a veteran.

If qualified, the VA Aid & Attendance program can provide up to:

***FREE MONEY ALERT!!!***

***The VA Aid & Attendance Program can make a HUGE difference for qualifying veterans that don't yet meet the criteria of needing nursing home level care, but are receiving care at home or in an Assisted Living Facility.***

- $1,703/month for a qualified veteran
- $2,019/month if the veteran is married
- $1,094/month for a surviving spouse of a qualified veteran

To read more about the VA Aid & Attendance program, see the two chapters on the program towards the end of this book.

## Other Methods of Payment

Other ways of paying for care while living at home include paying out of pocket or through long term care insurance.

### *Private Pay*

As you might guess, this involves using your own personal funds or family funds to pay for the cost of care and services needed.

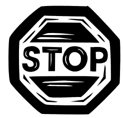
### *Long Term Care Insurance*

This is a great option if you planned ahead. Unfortunately, most seniors don't have long term care insurance and if they've already been diagnosed with a serious illness such as Alzheimer's, dementia, Parkinson's, stroke, heart attack, etc., and then it's probably too late to apply for long term care insurance.

# Chapter Six:
# Paying for an Assisted Living Facility in North Carolina

The options for paying for care in an Assisted Living Facility are pretty much the same as the list of in-home options discussed before. However, I did want to take a second to cover an issue that I see come up periodically.

I've run into many people that have been told by caseworkers that they "accept Medicaid." Unfortunately, this can be grossly misleading.




***CAUTION!!!***

***If an Assisted Living Facility tells you that they accept Medicaid, be sure to get a second opinion from a qualified elder law attorney.***

In some instances, what they are really referring to is that they accept the Special Assistance program (many people interchangeably call both programs "Medicaid" but recall from the prior section that it is more difficult to qualify for Special Assistance).

In other instances, it could be that if they are providing certain services to an individual, those services (such as certain medications or medical care) may be eligible for Medicaid, BUT the main cost of the Assisted Living Facility is NOT covered by Medicaid. Generally, the bulk of the expense of an Assisted Living Facility is considered "room and board" which is a service not covered by Medicaid.

# Chapter Seven: Paying for Nursing Home Care in North Carolina

Most seniors are woefully unprepared if they find themselves needing nursing home care. And most families cannot afford to privately pay the constantly increasing cost of nursing homes. But if you talk to your local Medicaid office or the caseworker at the nursing home, you'll be told that Medicaid will only pay for care once you have "spent down" your assets to meet their asset and income limit tests.

So let's start with the basic rules:

## What Are the Basic Asset & Income Rules for Medicaid Qualification?

### *Allowable Income for Applicant*

How much income are you allowed under Medicaid law? If you are married, there are different answers for the "Community Spouse" (i.e., the spouse that is still at home) and the individual who resides in a nursing home (we'll refer to him or her as the "Applicant").

An Applicant can only keep $30 per month as a personal needs allowance, plus an allowance for any uncovered medical costs (such as health insurance and Medicare supplement insurance premiums).

If the Applicant is married, Medicaid will also permit an allowance that must be paid to the "Community Spouse" that continues to live at home.

The rest of the Applicant's income must be paid toward the cost of their nursing home care.

In determining who the income belongs to, Medicaid uses a "name on the check" rule to allocate income between the Applicant and the Community Spouse.

## *Allowable Income for Community Spouse*

Medicaid will not touch the income of the Community Spouse and the Community Spouse will not have to use his or her income to pay for the nursing home expenses.

In some instances, if the Community Spouse's income is lower, then Medicaid will permit the Community Spouse to use some of the Applicant's income rather than requiring it to be contributed toward the Applicant's cost of care. This is known as the Minimum Monthly Maintenance Needs Allowance or MMMNA. The MMMNA is currently $1,839 per month. Thus, if the Community Spouse's income is below the MMMNA, the difference can be made up from the nursing home spouse's income.

In certain circumstances, the Community Spouse is permitted allowances for housing costs such as taxes, mortgages and insurance. In total, under the right circumstances, the maximum MMMNA can be up to $2,739 with the allowances.

If the Applicant has a dependent child living at home with the Community Spouse, Medicaid pay permit an additional income allowance.

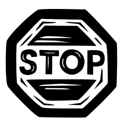
Finally, Federal law technically provides that if the Community Spouse has more than the allowable income, then he or she may need to contribute up to 25% of the excess towards the Applicant's cost of care.  Fortunately, North Carolina is not currently enforcing this provision (though given the State's budgetary constraints, that may change in the future).

## *Assets*

Generally speaking, assets fall into two categories: "countable" and "non-countable". To qualify for Medicaid benefits in North Carolina, a nursing home resident (i.e., the Applicant) can only have $2,000 of countable assets.

For a married couple, the Community Spouse of the nursing home is permitted to keep one-half of the couple's assets up to a maximum of $109,560.  This protected amount is known as the Community Spouse Resource Allowance (CSRA).

When planning to meet these asset limits, it is critical to properly determine the date on which the Medicaid department is going to calculate your assets—this is generally referred to by elder law attorneys as the "Snapshot Date."  It's often in a




***CAUTION!!!***

***Not understanding what the Snapshot Date will be can unnecessarily cost your family THOUSANDS of dollars.***

***Consult with an elder law attorney to be sure you have properly calculated your Shapshot Date.***

couple's best interest to have a *higher* level of assets on the Snapshot Date and then conduct the rest of their "Spend Down" after the Snapshot Date (don't worry, we'll talk more in a bit about what a "Spend Down" is.)

The Snapshot Date is the first day of the first continuous 30 consecutive day period that the Applicant spouse has been confined to a hospital, nursing home or both. It doesn't matter when this occurred, so if the Applicant spouse had a 30+ day hospital stay 10 years ago, then the first day of that hospital stay would actually be the Snapshot Date.

### *Exempt or Non-Countable Assets*

Certain assets are non-countable, such as:

- All or part of the Applicant's principal residence (up to $500,000 for a single applicant, no cap for a married applicant)
- Personal possessions, such as furniture, clothing, jewelry, etc.
- One motor vehicle
- Irrevocable prepaid funeral plan for Applicant, Community Spouse and/or family members OR up to $1,500 may be earmarked for burial purposes if you do not have an irrevocable funeral plan


***CAUTION!!!***

***Your home may still be at risk of being taken by Medicaid.***

***Be sure to read the Medicaid Estate Recovery section of this book to find out why!***

- Life Insurance (if total face value of any policies that have "cash value" is below $10,000)
- In limited contexts, "Other Assets" needed to raise the Community Spouse's total income up to minimum (referred to as the "MMMNA" or "Minimum Monthly Maintenance Needs Allowance")
- If the Applicant doesn't own a home, then the Applicant can purchase a "life estate" in another's home (such as a child or family member). A life estate is the right to live in a residence for your entire life without owning it.
- A home owned jointly with a sibling for at least one year
- Medicaid Compliant Irrevocable Annuity—this is a very specific type of annuity that we'll talk about more in a bit, but if used properly it is a non-countable resource (though the annuity payments will be counted as income).

## Treatment of Retirement Accounts

In the past, many people received pensions during their retirement years, and some are still receiving these pensions. But over the years, various retirement accounts such as 401Ks and Individual Retirement Accounts (IRAs) have become much more common.

For Medicaid purposes, if an account can be withdrawn or liquidated, it will be deemed a countable asset. Medicaid does not care if you have to pay taxes or suffer some sort of withdrawal penalty for liquidating the account.

# Chapter Eight: BEWARE: Medicaid Estate Recovery and Property Liens

What happens to a Medicaid recipient's estate after he or she passes away? Like so much else, that depends on whether they have properly planned to protect it.

## Medicaid Estate Recovery

When a Medicaid recipient dies, the State must attempt to recover the benefits paid to that individual from his or her probate estate—this is a requirement under Federal Medicaid law. However, the State cannot proceed with this recovery process if any of the following applies:

- If the recipient's spouse is still living
- If the recipient has a child under 21 years of age
- If the recipient has a child who is blind or disabled


***CAUTION!!!***

***A thorough long term care plan should consider not only Medicaid qualification options, but should also reduce potential exposure to Medicaid estate recovery.***

Unfortunately, I hear far too many stories of people who received Medicaid benefits and had used the home exemption that we discussed above to qualify for the benefits. What they didn't realize is that by relying on that exemption, their home is still at risk of being taken during the Medicaid Estate Recovery process.

Recently, I spoke with a woman whose aunt had recently passed after being on Medicaid in a nursing home. She was shocked when she received a letter indicating that Medicaid was going to force the family to sell her aunt's home and repay Medicaid for the benefits that were provided to her aunt.

The good news is that there are various planning techniques available through the use of trusts or certain types of real estate transfers that can avoid this situation. A qualified Medicaid Planning Attorney can advise you on the planning options available to avoid exposure to Medicaid Estate Recovery.

# Chapter Nine:
# Old Rules & New Rules

Okay, bear with me here. Soon we are going to start discussing transfers and other planning techniques, but before we do, we need to go over a few miscellaneous items.

As I mentioned towards the beginning of the book, Medicaid is Federal law that is implemented by the State. In 2006, Congress passed major changes to the Federal laws. However, it took the states time to actually start implementing the new rules (in fact some states still haven't!).

North Carolina began operating under the new rules as of November 1, 2007. Thus, the new rules apply to transfers made on or after November 1, 2007. The older rules still apply to transfers made on or before October 31, 2007.

As such, the "old rules" could still be applicable for certain gifts or transfers to people (or more technically 'non-trusts') and the old rules could be applicable to certain transfers to trusts until as late as October 31, 2012.

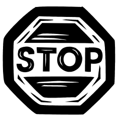
If you're reading this book and you haven't previously attempted any Medicaid planning, then chances are pretty good that we won't have to worry too much about the old rules. However, if you have any doubts about whether any prior planning or transfers fall under the old rules or new rules, I strongly encourage you to discuss them in more detail with a qualified Medicaid planning attorney.

# Chapter Ten:
# Look Backs and Penalty Periods

In the next section, we're going to start looking at planning techniques, but before we do, it's important that we clarify an area of major confusion.

## The Look Back Period

Many people think that if you transfer or give assets away, you must wait 60 months before you'll qualify for Medicaid (or sometimes you'll hear 36 months, but that's based on outdated rules). This is not the case. The 60 month requirement only applies to the *financial disclosure* that you must provide to Medicaid, not your actual eligibility.




***CAUTION!!!***

***Many people mistakenly believe that if they make any gifts or transfers, they will be ineligible to receive Medicaid benefits for 5 years. This is not necessarily true. It depends upon the size of the transfer. Carefully calculated gifts or transfers may sometimes be a prudent part of a Medicaid qualification plan.***

Think of it this way: When you go to apply for Medicaid, imagine you have a box with you. Inside that box is paperwork and documentation for every financial transaction you've made for the previous 60 months. That is all you need to provide to Medicaid—if you made a transaction 61 months ago, it doesn't have to be included in the box. So 60 months is just the size of your "box" of records…it's that simple.

However, this has nothing to do with determining your actual eligibility for Medicaid! Instead, it depends upon what Medicaid sees in the "box" that will determine whether or not you qualify for Medicaid benefits. This 60 month period is what is referred to as the Medicaid "look back period."

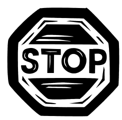
## The Penalty Period

Now, what is Medicaid looking for when they look in your "box"? They are looking to see what you've been doing with your assets over the past few years. Namely, they are looking for transfers or gifts of assets.

### *Compensated vs. Uncompensated Transfers*

For each transfer or gift that Medicaid sees in your "box", they are going to classify it as either "compensated" or "uncompensated."

A compensated transfer is where you gave and received something of value. So you paid money to the car dealership for a new car, or you paid




***CAUTION!!!***

***Not understanding what the Penalty Period is and when it will begin can unnecessarily cost your family THOUSANDS of dollars.***

***Consult with a qualified Medicaid planning attorney to be sure you have properly calculated your penalty and applicable dates.***

to have your home painted, or you paid an attorney to assist you with your legal planning.

An uncompensated transfer is one where you gave away or transferred something but did *not* receive back something of equivalent value, such as a gift. So, if you made gifts to your children or transferred assets to certain types of trusts, then these may be considered uncompensated transfers.

Ultimately, Medicaid is going to try to punish you a little bit by creating a penalty period based on those uncompensated transfers. The length of the penalty period will be determined by adding up all of the uncompensated transfers and dividing by a “monthly divisor” to determine the number of months of your penalty period.

As of the writing of this book, the monthly divisor is $5,500. However, it is adjusted periodically for inflation. So another way to think of it is that for every $5,500 transferred, the Medicaid applicant will be ineligible for nursing home Medicaid benefits for one month.

So here’s an example of what this might look like:

You bring your “box” of records to Medicaid. They review all of the documents and decide that you made a total of $115,000 of uncompensated transfers. Medicaid would then deem that you are ineligible for Medicaid for 20.91 months ($115,000 ÷ $5,500 = 20.91).

It is important to understand that there is also no cap on how long the penalty period can be. Thus, if you made some very large transfers, you may be better off waiting until those transfers no longer have to be reported in your 60 month “box” of records. For example, if you transferred $425,000, the penalty period would be 77 months. This is why I cautioned earlier that it is critical to understand how the various dates work for purposes of your Medicaid application.

## When Does the Penalty Period Begin?

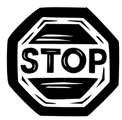
This is another area where the new rules made things more difficult and it gets a bit confusing.

Under the "old rules" the penalty period started upon the date the transfer was made. Thus, frequently by the time the person actually needed Medicaid and filed their application, the penalty period had already run its course and they were eligible almost immediately.

However, under the new rules, the penalty period does not begin running until the Applicant is in a nursing home with a physician's formal approval AND the Applicant is otherwise financially eligible for Medicaid benefits (i.e., but for the penalty period, the person would have been eligible).

The easiest way to understand this is to go through an example:

Let's assume Mary was planning ahead of possible nursing home needs and decided to transfer $125,000 to her children. At the time of the transfer she is still relatively




***CAUTION!!!***

***Remember Myth #2 at the beginning of this book?***

***NEVER transfer assets to children without first talking to a qualified Medicaid planning attorney.***

***Doing so could be disastrous to your Medicaid application and cost your family THOUSANDS of dollars unnecessarily.***

healthy and living at home. The $125,000 transfer is going to create a penalty period of 22.72 months.

Two years later, Mary falls ill and enters a nursing home. Let's assume on the day she entered the nursing home, she is financially eligible (i.e., she meets the income and asset tests that we discussed previously). Her penalty period wouldn't actually start until the day that she was admitted to the nursing home, meaning that she and her family would have to figure out how to privately pay for the nursing home care for 22.72 months before Medicaid benefits will kick in.

Now, let's assume instead that on the day Mary entered the nursing home, she still had too many assets (i.e., she was not "otherwise eligible" for Medicaid benefits). It takes her another 3 months to get her assets low enough to meet the Medicaid financial qualifications. In that case, the penalty period wouldn't start running until 3 months after Mary entered the nursing home. In other words, Mary and her family would have to privately pay for nursing home care for 25.72 months.

As you can see, this planning becomes complicated. That's why it's so important to only undertake this sort of planning with proper legal guidance.

# Chapter Eleven:
# Trusts

Okay, I promise we're going to get to the planning techniques soon, but we need to cover one more area before some of those techniques will make sense.

## What Is a Trust?

A "trust" is basically a contract in which you give instructions to a "trustee" as to how you wish the trustee to hold and manage your property for the benefit of a "beneficiary." The terms of the trust document control what the trustee can do with the property held by the trust and as well as under what circumstances the trustee is authorized to make distributions to the beneficiary.

Trust property can be of any kind including bank accounts, stocks, brokerage accounts, real estate, etc. The property contributed to the trust is referred to as the "principal." Any interest, dividends, rent or other income generated by the trust is referred to as the trust's "income."

The creator of the trust is referred to as the trustmaker (or you may also hear the terms "grantor" or "settlor").

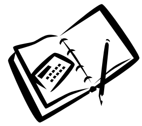
You can fill more than one role too. So, depending on the context, you might be the trustmaker, the trustee *and* the beneficiary!

There are also two general types of trusts—revocable and irrevocable—and Medicaid is going to view the trusts differently depending on which type you have.

## Revocable Trusts (also known as "Living Trusts")

As the name implies, a revocable trust can be changed or revoked entirely by the trustmaker at any time. These trusts are commonly used for estate planning purposes for various reasons such as avoiding probate, privacy, tax planning, remarriage concerns, protecting beneficiaries from financial irresponsibility, creditors, lawsuits and divorce. However, generally, while a revocable trust might be helpful for your other estate planning goals, they are not going to be of much help for Medicaid planning purposes.

That's because all of the assets held by a revocable trust are countable in the eyes of Medicaid. As far as Medicaid is concerned, if you have the power to revoke the trust and gain access to your assets, then the assets are countable for qualification purposes.



***ADDITIONAL RESOURCE ALERT!!!***

***If you'd like to learn more about using living trusts for general estate planning purposes, be sure to visit our website for more information.***
***<u>www.CarolinaFEP.com</u>***
***While you're there, be sure to request our special report "The 12 Most Common Threats to your Estate & Your Family's Future"***

The good news though, is that there is no penalty for transferring assets from your name into a revocable trust or from the revocable trust back to your name. So if you've previously set up a revocable trust or living trust, you can still explore Medicaid planning options.

For example, let's assume that John previously set up a living trust and transferred his home to the living trust. For Medicaid purposes, because the home is owned by the trust rather than by John, it would be considered an asset. However, as trustee, John can transfer the home back out of the trust, without penalty, and put it back in his name, therefore converting it back to a non-countable asset. He can then engage in a different planning technique to ensure that the home is protected for Medicaid Estate Recovery purposes.

## Irrevocable Trusts

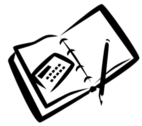
As the name suggests the word "irrevocable" means that it cannot be changed. However, it is important to understand that when a trust is called an Irrevocable Trust it just means that *some part* of it is irrevocable. Thus, it very much depends on the terms of the trust and the situation in which we are using the trust.

A quick side note: Irrevocable trusts are also used sometimes for estate tax planning purposes. The IRS rules are very strict about using trusts for tax planning purposes. As a result, irrevocable trusts used for tax planning are generally very restrictive—meaning that the trustmaker has to give up all ownership and control of the assets and can't ever take them back. But this is because of the tax rules, not the trust laws. Fortunately, for Medicaid planning purposes, the rules are different and the trusts don't have to be as restrictive.

For Medicaid planning purposes, the basic rule is that any portion of the trust that can be distributed to the Medicaid Applicant from the trust will be considered an available asset (just like with the revocable trust). If there are no circumstances under which you could receive assets from the trust, then none of it will be countable.

Any transfer to a trust that is irrevocable will be considered a gift or uncompensated transfer and will be subject to the look back period and penalty period discussed previously.

For example, if you set up an irrevocable trust and put $150,000 of assets in it, but the trust contract states that if you want, you can take back up to $15,000, then for Medicaid purposes, $15,000 of the trust will be considered countable and the remaining $135,000 will be deemed non-countable (but, remember that the $135,000 transfer to the trust will be deemed a gift, subject to the 5 year look back period and a penalty period of about 24 months in this case).



***QUICK TIP:***

***A carefully crafted irrevocable trust can still allow you significant control and protection of your assets for Medicaid purposes, while also having an emergency "trap door" if needed.***

## Planning with Irrevocable Trusts

Although we need to be mindful of our look back and penalty periods, because transfers to an irrevocable trusts can become non-countable assets, irrevocable trusts are an extremely useful tool in our Medicaid-planning tool bag.

Now, the idea of irrevocably putting assets in a trust makes some people nervous, and understandably so! Even if you have been a life-long saver and live well within your means, there's always a part of us that is convinced that the day after you put the assets in the irrevocable trust is the day you're suddenly going to need them, right?

Well, rest assured, with proper and careful drafting, these irrevocable trusts used for Medicaid purposes can include a "trap door" of sorts. Under the Medicaid rules, you can't have the right to take the assets back (remember, that would make them countable!). But, what if instead, we gave the trustee the right to give assets to someone trustworthy such as a child or close relative? That child or relative could then turn around and hand the funds back to you. In my office, we call that the "two-step dance."

But as you can image, this all has to be done very carefully and 'by the book' so to speak. This is not a time to cut corners. Be sure you are working with a qualified Medicaid planning attorney to make sure your trust is set up properly.

## My Income Trust (MIT) (also known as "Income Only Trust")

Now, what if you want to protect some of your assets, but you are also currently living off of some or all of the income generated by those assets (such as interest, dividends or rent)?

As we mentioned above, a trust document can distinguish between the principal assets owned by the trust and the income generated by those assets. As such, it is possible to set up an irrevocable trust in which you give up the right to principal, but still keep the right to any income generated off of those assets. Kind of the best of both worlds, huh?

Now, you have to be careful that the income from the trust assets isn't going to bump you over the Medicaid income qualifications that we talked about previously. If that is a concern, then it is actually possible to set up the trust so that you only have a right to a *portion* of the income, such as 60% or whatever seems appropriate under the circumstances.

The other neat part? Remember we said that a trust can own all different types of assets? The trustee cannot withhold income once you are in a nursing home, but the trustee can modify the investment mix over time. For example, let's assume that you are currently living at home but would like to start planning ahead for Medicaid purposes. You use the dividend income from your brokerage accounts to live off of. Thus, you decide to set up an irrevocable trust and retain the right to all income.

After a year or two though, your health deteriorates and placement in a nursing home is imminent. So you pick up the phone and call your financial advisor or stock broker and have them update the investment mix in your brokerage account towards investments that don't pay dividends, thus reducing or eliminating the income generated by the trust.

***FINANCIAL ALERT!!!***

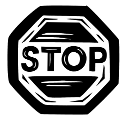
***Make sure your Medicaid planning attorney and your financial advisor or stockbroker are working together closely to ensure you are using the proper financial products and investment mix to accommodate your needs.***

## Irrevocable Trusts vs. Outright Gifts

I'm often asked about the advantages or disadvantages to using an irrevocable trust for Medicaid planning purposes rather than making outright gifts. What if you don't need a nursing home right now, but are just planning ahead in case you do in the future? Should you just transfer your accounts to your children or would it be better to place them in an irrevocable trust instead?

In most instances, an irrevocable trust is going to be more favorable for the following reasons:

- An irrevocable trust protects your assets during your lifetime from your own future lawsuits and creditors and your children's creditors.
- The trust protects your assets if your child ever gets divorced. If you made an outright gift to your child, your assets could be lost to the ex-spouse in the divorce settlement.
- If you transfer assets directly to a child, they are exposed to your child's creditors. Thus, if your child ever suffers a serious catastrophe or health crisis and finds him or herself in bankruptcy, your assets would be at risk. An irrevocable trust would prevent this.




***CAUTION!!!***

***While using gifting instead of trusts may seem simpler, in the long run, it can create a host of problems and risks. Among other things, a trust can include a "trap door" so we can undo the transaction, if needed. This may not be possible if gifts are used instead. Unfortunately, we have seen examples where children refused to give the money back when needed or had already spent the funds.***

- Similarly, if your child is ever being sued for causing an accident or some other purpose, your assets would be exposed to the lawsuit. That would not be the case with an irrevocable trust.

- Occasionally, in a pre-planning context, we may end up needing to 'undo' part of the transfer because the person's health declined more rapidly than anticipated. Unfortunately, we've seen examples where children refused to give back the assets or had already spent the assets, leaving the family in a real bind.
- You may be able to serve as a trustee of the trust and therefore still continue to manage your assets and investment as you deem appropriate.
- The trust is not subject to Medicaid Estate Recovery upon your death.
- You can still control the ultimate distribution of your assets upon your death by retaining the ability to change the final beneficiaries of the trust (to anyone but yourself).
- Under the new Medicaid rules, transfers to trusts and transfers to individuals are treated the same (under the old rules there were some provisions that weighed in favor on transfers to people rather than trusts).
- You can continue to retain income for your lifetime by using the irrevocable trust. This is not the case if you transfer assets to a child. Though they might be willing to give income back to you, it is not guaranteed (and such transactions may be subject to gift taxes).
- Depending on what income tax bracket you and your child are in, most of the time, the trust is going to result in more favorable income tax treatment than an outright gift to your children.
- Under the income tax rules, if you sell your home, you generally don't have to pay any capital gains tax due to a

special exclusion. By using a trust, you would still be able to take advantage of that exclusion in the future.

- As mentioned, the trust still can permit "trap door" distributions to family members, if necessary.
- Finally, it is generally better from a tax-perspective for your children to receive your home or assets upon your death rather than during life. This is because upon your death, those assets are eligible for what is known as a "step up in basis" to the date of death value, saving income taxes for your children.

So what are the potential disadvantages to using an irrevocable trust instead of gifting outright to children?

- You will incur legal fees to prepare the trust documents
- You'll need to invest a little time in getting comfortable with how the trust works
- You'll need to open a separate bank account in the name of the trust

Generally, for all but the smallest of estates, the benefits of the irrevocable trust are going to outweigh any potential disadvantages, but always be sure to discuss both options with your Medicaid planning attorney.

## Other Types of Trusts

Occasionally in the world of Medicaid planning, you might see references to a couple of other types of trusts, but they are generally used in very specific circumstances.

### *Self-Settled Trusts*

These are generally used by disabled individuals under the age of 65 and thus, come up less frequently in the context of nursing home planning.

### *Pooled Trusts*

Pooled trusts are set up by non-profit organizations that hold the funds on behalf of a disabled individual and use them to supplement the individual's living expenses. While these are occasionally useful, this biggest drawback is that any unused funds remaining upon the disabled individual's death must either be kept by the pooled trust for the benefit of the other trust participants or the funds will go towards repaying Medicaid. In other words, your spouse or family doesn't get to keep the unused funds.

### *Trusts Created by Another Person for which You Are a Beneficiary*

If you are the beneficiary of a trust created by someone else (such as a parent or spouse) and that trust instructs the trustee to pay for your "support," "health care" or similar terms, then Medicaid will consider the trust assets to be countable assets when you apply for Medicaid under the argument that the nursing home expenses constitute health care or support expenses that the trustee is obligated to pay for.

However, it is important to have the trust reviewed by an attorney to determine whether the trust assets are truly countable or not. It all comes down to the specific provisions contained within the trust document. In some cases, the trust might actually be what is referred to as a “Supplemental Needs Trust” which may allow you to still be eligible for Medicaid while using some of the trust funds to supplement Medicaid by paying for certain permissible expenses.

### *Testamentary Trusts*

This is probably easiest to explain in the context of an example, so let’s assume that we have a married couple, Bob and Susan. If Bob creates a trust for the benefit of Susan, Medicaid will treat the trust as if were created by Susan for her own benefit and they will deem it available to Susan and therefore a countable asset.

However, under an exception in the Medicaid rules, if the trust is created *within Bob’s will* (meaning that it will not actually come into being until Bob’s death), then after Bob’s death, the trust assets will *not* be countable to Susan for Medicaid purposes.

Trusts that are contained within a will (more formally known as a “Last Will and Testament”) are called Testamentary Trusts.

# Chapter Twelve:
# Basic Medicaid Planning Techniques

## Hiding Assets

Don't do it. Plain and simple. Failing or "forgetting" to disclose assets on your Medicaid application is Medicaid fraud and subject to serious consequences:

- You will be liable to the government for damages ranging from 2 to 3 times the amount of benefits which you wrongfully received;
- You will be liable for penalties ranging from $5,000 to $10,000 *for each* false claim submitted;
- You will be responsible for paying all costs associated with the government bringing a lawsuit against you (i.e., the governments legal fees);
- You will be subject to criminal charges resulting in a prison sentence of up to one year and a $10,000 fine; and
- You may also be barred from receiving Medicaid for up to one year.

And guess what? Those are just the Federal penalties! The State of North Carolina will also impose its own penalties.

But how will they know, you ask? The Medicaid rules actually provide *incentives* for others to report your wrongdoing. Namely, anyone reporting a valid case of Medicaid fraud will be rewarded with a 15% to 30% "cut" of the penalties imposed upon you.

Bottom line: Don't do it!

## Crisis Planning vs. Pre-Planning

The best strategies and their proper implementation are going to vary a bit depending on various factors, one of which is timing. If you are currently in a nursing home or nursing home placement is imminent, this is what I refer to as "Crisis Planning".

If instead, you are merely planning ahead for the possibility of needing a nursing home, that is what I refer to as "Pre-Planning."

***FINANCIAL ALERT!!!***

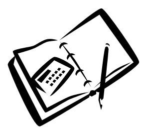
***As a general rule of thumb, you are almost always going to have more options available to you and/or be able to protect more assets if you engage in pre-planning rather than waiting until a time of crisis.***

In either situation there should be strategies available to protect some or all of your assets, but the particular strategies recommended and their timing may vary depending upon the context.

## Spend Down

In your research you may have seen references to a Medicaid "spend down" and you weren't sure what it meant. It kind of conjures up images of going on some sort of wild spending spree, doesn't it?

Previously we discussed the basic Medicaid asset rules.



***QUICK TIP:***

***While it might conjure visions of wild spending sprees, a proper "spend down" plan should be carefully planned to maximize your assets and increase likelihood of qualifying for benefits.***

Once you add up all of your countable assets, the amount that you are left with are your "excess" assets which must be "spent" before you will qualify for Medicaid benefits.

Thus, the core of Medicaid planning is figuring out how to effectively spend those assets. No, we're not just going to go on a frivolous spending spree (unless that's what you want to do). Instead, we're going to look at whether we can use certain planning techniques to convert those excess countable assets into *non*-countable assets.

Please note that in a pre-planning context, it is not yet necessary to actually convert countable assets to non-countable assets, but you may want to 'earmark' which assets can be converted to give yourself an idea of where you stand planning-wise.

## Techniques for Converting Countable Assets to Non-Countable Assets

### *Home Improvements*

If your home is already an excluded asset, then perhaps it's time to make some home improvements. Examples might include things such as:

- New roof on the house
- Finishing your basement
- Updating your kitchen
- Replacing an outdated heating or air-conditioning system
- Paving the driveway

Similarly, if you have a mortgage or home equity loan on your home, you may wish to pay it off.

Or, maybe it's time to move to a newer or bigger home (just remember that your home equity cannot exceed $500,000).

If your home equity exceeds $500,000, then you may want to consider strategies to reduce your home equity, such as taking out a reverse mortgage, a home equity loan, or deeding a small ownership interest in your home to another family member (though this may trigger a penalty period based upon the value of the transfer).

## *Personal Property*

We also discussed that personal property is non-countable. So perhaps it's time to upgrade your wardrobe, furnishings, buy that big screen television you've had your eye on, purchase a new computer, and so on.


***CAUTION!!!***

***While purchasing personal property can be an effective spend down strategy, don't go overboard. Spending too much on artwork, jewelry or a Ferrari or Rolls Royce could cause the Medicaid caseworker to consider these 'investments' or 'collectibles' rather than personal property (thus making them countable assets).***

## *New Automobile*

Again, since a car is generally a non-countable asset, it may be time to purchase a new or bigger automobile. Medicaid may limit the value of the automobile exclusion for single applicants, so consult with your Medicaid planning attorney before making a purchase.

### *Funeral and Burial Expenses*

If you haven't already done so, you can prepay for an irrevocable funeral contract. This will not only use up some of your excess funds, but will also ensure that your family will not have to pay for your funeral and burial out of their own pockets. With the average funeral ranging between $5,000 to $10,000, this can be a good way to spend down some excess funds.

In fact, if you are willing to, you can even prepay for burial spaces and funerals for other family members. (Nothing says Happy Holidays like a pre-paid funeral, right???)

### *Annuities*

Annuities meeting very specific qualifications are non-countable for Medicaid purposes and are frequently used in the context of Medicaid planning. However, because the rules are detailed, we're going to talk about them in their own section a little further down the road.

## Techniques for Converting Non-Countable Assets to Countable Assets

Why would we ever want to do this? Remember when we talked about the Snapshot Date and I mentioned that sometimes it's actually better for a married couple to have a *higher* level of countable assets on the Snapshot Date?

If that's the case, then we might want to actually convert non-countable assets to countable assets. The easiest way to do this is probably to transfer assets to a revocable living trust.

For example, let's say you own a home and you previously set up a living trust as part of your estate plan. But the home is not owned by the trust. Instead, it is still owned jointly by you and your spouse and is a non-countable asset for Medicaid purposes. Well, what if you called your attorney and asked her to prepare a deed transferring the home to your living trust?

Note that for this strategy to work, it must be done before either spouse has moved into a nursing home, because the countable assets must be increased *before* the Snapshot Date.

## Retirement Accounts

As previously mentioned, Medicaid will consider retirement accounts to be countable assets if they can be liquidated. In a crisis scenario, be sure that your spend-down plan includes any income taxes or penalties that will need to be paid due to liquidating a retirement account.

In a pre-planning context, your attorney, financial advisor and accountant should work together to figure out the best strategy for handling your retirement accounts to both maximize the likelihood of Medicaid qualification while minimizing your tax exposure as much as possible.

## Personal Service Contracts

If a child or family member is providing personal care services to a parent or relative, then a personal service contract may be an effective Medicaid planning technique. Under the rules, you are permitted to provide reasonable compensation for care services being provided for you. What is reasonable will be based upon the type of services being provided and the going rate if you had to hire someone to provide such services in your community.

Personal Services Contracts should be handled with care, as the Medicaid department is likely going to examine them very closely. Here are a few pointers:

- It should be in the form of a written contract entered into *prior* to the rendering of the personal services;
- It should include specific details about what services are being provided;
- Both the person receiving the services (or their agent under a Durable Power of Attorney) and the person providing the services should sign the contract;
- The contract should be signed, dated, and notarized;
- You should call a few services providers to establish what a reasonable compensation rate is for the services being provided (be sure to document your findings);
- Once service begins, you should keep detailed accounts of all services provided and compensation made.


***CAUTION!!!***

***Though Personal Service Contracts can be a great tool, they must be handled with care and they should <u>not</u> include compensation for past services.***

Services that might be provided under such a contract may include, among other things: preparing meals, cleaning, laundry, assistance with grooming and personal hygiene, bathing, grocery and personal shopping, monitoring physical and mental condition and nutritional needs in cooperation with health care providers, arranging for transporting, visiting weekly and encouraging social interaction, interacting with and/or assisting in interacting with health care professionals, etc.

Many parents and children do not realize the personal care contracts are an option and by the time they meet with an elder law attorney, the children have already provided months or years of care. Unfortunately, it is not recommended that you try and enter into a personal services contract after-the-fact for services that have already been given. If a parent transfers funds to a child to recognize prior care given, Medicaid will treat such transfer as a gift and will calculate the appropriate penalty period based upon the size of the transfer.

Finally, remember that whenever a person is hired to perform services in exchange for compensation, that person is required to report the income. In other words, if you enter into a personal services contract with a child or family member, they are obligated to report the payments received from you as income on their annual income tax return. It is recommended that you consult with your accountant to ensure compliance with all tax rules including any applicable income tax withholding rules, social security rules, and employee compensation rules.

## Planning for Remaining Excess Access

So what happens when you've converted as many assets as possible from countable to non-countable (or 'earmarked' them as convertible if you're in a pre-planning context)? That's when we might look at the use of transfers, irrevocable trusts and/or annuities. The proper use and mix of the tools will depend on the context.

# Chapter Thirteen:
# Transfers Not Subject To Penalties

Certain gifts and transfers may not be subject to penalties under the Medicaid rules. However, it is important to distinguish between Medicaid rules and *tax* rules here. Some of the following transfers may be permissible for Medicaid planning purposes, but depending upon the size and type of transfer, they may trigger a gift tax consequence.

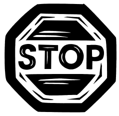
Though we touched on them very briefly in Myth #5 way back at the beginning of the book, the gift tax laws are beyond the scope of this book, but your Medicaid planning attorney should be able to advise you on the subject.

## Transfer to Spouse

A transfer between spouses will not be penalized for Medicaid planning purposes. Remember that the assets of both spouses will be considered in determining your financial eligibility. However, this can be a useful technique for avoiding Medicaid Estate Recovery. If one spouse is ill and may require nursing home care, it may be prudent to transfer assets into the Community Spouse's name.

## Transfer to Blind or Disabled Child

A transfer of assets to the Medicaid applicant's child who is legally blind or who is disabled (as determined by the Social Security rules, i.e., the child is receiving SSDI), will not create a penalty period. BUT, if the child is receiving benefits such as SSDI, be careful that the assets being transferred to the child will not cause the *child* to become ineligible for his or her government benefits as a result of the transfer! The better alternative is to properly make the transfer to a trust for the benefit of the blind or disabled child.




***CAUTION!!!***

***Transferring funds to a disabled child could cause him or her to lose their own benefits! Consider establishing a trust for the child instead.***

## Trust for the Sole Benefit of a Blind or Disabled Child

This is a trust that permits Medicaid applicant to set aside funds for their blind or disabled children without creating a penalty period. It must be an irrevocable trust that is for the "sole benefit" of the blind or disabled child. In other words, the child must be the only beneficiary. The payments made to the child or for the benefit of the child from the trust must be "actuarially sound" and based on the child's life expectancy. Again, you must be careful that the distributions from the trust do not cause the *child* to lose his or her government benefits as a result of the gift.

Your attorney must draft the trust as a "supplement needs trust" meaning that it is intended to supplement the government benefits and is permitted to pay for specific expenses such as alternative therapies, medical or dental work not covered by their government benefits, haircuts, over the counter medications, travel expenses to visit family members, specially equipped automobile or van, furniture and home furnishings, clothing, cell phone and service, vacation, entertainment, upgrading to a private room if in a facility (most government programs only provide for semi-private rooms) and legal fees.

Upon the beneficiary's death, any unused assets remaining in the trust may be subject to estate recovery rules.

## Trust for the Sole Benefit of a Disabled Person Under Age 65

Similar to the trust for the sole benefit of a disabled child, a Medicaid applicant can transfer assets to an irrevocable trust for the "sole benefit" of a disabled individual that is under the age of 65 without triggering a penalty period. This exception can be used for those other than children, such as a disabled grandchild, sibling, or other family member. The trust must meet the same requirements of being actuarially sound and based on the individual's life expectancy. And again, make sure that the disabled beneficiary is not going to lose his or her government benefits as a result of the gift.

Upon the beneficiary's death, any unused assets remaining in the trust may be subject to estate recovery rules.

## Transfer of the Home to a Caretaker Child

A transfer of the Medicaid Applicant's home to a child will not be penalized if the child was living in the house as his or her sole residence for *at least* two years immediately prior to the date the parent entered the nursing home *and* the child was providing care to the parent prior to the parent being admitted to the nursing home which delayed how soon the parent needed to enter the nursing home.

To qualify for this exception, the child must be able to document:

- That the parent would have required nursing home care if it hadn't been for the child's assistance (this is done by a physician's assessment)
- What care and services the child actually provided to the parent during this two-year period (it's important to keep good records!)
- Documentation such as tax returns, bank statements or bills demonstrating that the child was using the residence as his or her primary residence for the two years prior to the parent's entry into the nursing home

## Transfer of the Home to a Resident Sibling

A Medicaid Applicant may transfer a home to a sibling without penalty if the sibling has an ownership interest in the home and was living in the home for *at least* one year immediately prior to the date that the applicant was admitted to the nursing home. Note that for this exception, the sibling does not need to have been providing care to the applicant for the exception to apply.

## Transfer of the Home to a Minor, Blind or Disabled Child

No penalty will be imposed if the Medicaid Applicant transfers the home to a child who is under the age of 21 years, blind or disabled (though you may have to consider the same loss of benefits issue for the child that we discussed above).

# Chapter Fourteen:
# Old Transferring and Gifting Techniques

## The Old "Half a Loaf" Technique

Remember a while I ago I mentioned how the rules were changed in 2006 (but were not formally enacted in North Carolina until November 1, 2007)? Well, those rule changes made some major changes to how gifts and transfers are treated. Before we get to talking about the strategies that work today, I think it's helpful to understand how the old rules worked and then build off of them to see how things are different under the new rules.

Under the old rules, the penalty period for a gift or transfer began on the date of the transfer. So, for example, let's assume it's the year 2000 and Alice is concerned that she might need Medicaid in a couple of years, so to increase her likelihood of qualifying for Medicaid she transfers her excess assets of $100,000 to one of her children or to an irrevocable trust. And we'll assume at the time, the monthly divisor was $5,000. Thus, her penalty period would be 20 months ($100,000 ÷ $5,000 = 20). The 20 month penalty period would begin to run from the date that Alice made the transfer.

Exactly two years later (24 months), Alice's health begins to fail and she needs to be placed in a nursing home. Because the penalty period began running when Alice made the transfer in 2000 and more than 20 months have passed, Alice would be immediately eligible for Medicaid benefits (assuming she didn't have any other excess assets).

This treatment of transfer and the penalty period led to what commonly became known as the "Half a Loaf" technique in crisis-planning scenarios. The easiest way to show how it works is through another demonstration:

Let's assume again that it's the year 2000. Edward has entered a nursing home and has $100,000 of excess assets that must be spent down before he will qualify for Medicaid benefits. If he gave away the entire $100,000, this would create a 20 month penalty period and because he's already in a nursing home. That means he'd be stuck paying for the nursing home out of pocket for 20 months! But how is he going to pay for his care if he gave away all of his money? Maybe he gave it to his children and (if they haven't spent it already) they will use it to pay for his care, but at the end of the 20 months all of the money will be gone.

So what if instead of giving away the entire $100,000, he only gave away half of it, or about $50,000? This would only create a penalty period of about 10 months that begins from the date of the gift, and he still has $50,000 to pay for his cost of care during those 10 months. This gets Edward qualified for Medicaid benefits in half the time and protects about $50,000 for his family that otherwise would have gone towards Edward's cost of care.

Now the numbers typically didn't work out to exactly half, but you get the general idea right?

## Why The Old "Half a Loaf" Technique No Longer Works

So that was how it was done under the old rules. So what changed? Well, under the new rules the penalty period doesn't start running until the Medicaid applicant *enters* the nursing home *and* is "otherwise eligible."

So let's go back to our example with Alice, but we'll now assume that instead of making the transfer in 2000, she made the transfer in 2009 and entered the nursing home in 2011. Under the new rules, rather than the penalty period of 20 months beginning on the date of the transfer in 2009, instead it wouldn't start until she entered the nursing home in 2011! If she already gave away her money, how is she going to pay for her care?

Or, let’s look at Edward’s half a loaf approach again, but let’s assume that it’s 2011 when Edward enters the nursing home and has an extra $100,000 and he gifts away half. Yes, he’s already in the nursing home, but he is not “otherwise eligible” because he still has $50,000 of excess assets.

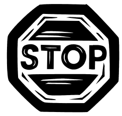
# Chapter Fifteen: New Transferring and Gifting Techniques

## New "Half a Loaf" Alternative: Transfer + Medicaid Annuity

When the new Medicaid rules were announced, a lot of people panicked. What would we do if we couldn't use the Half a Loaf technique anymore? Rest assured, it didn't take long to find a new approach.

The issue under the new rules is that if a person gives away half of their assets, the remaining half causes the person to not be "otherwise eligible." So what's the trick? Use the remaining funds to purchase a Medicaid Compliant Annuity (going forward I'll just call them "Medicaid Annuities" for short).

Again, we'll cover in a little bit what constitutes a Medicaid Annuity, but first let's look at how one might be used.




***CAUTION 1!!!***

***Be careful that when the monthly payments from the annuity are combined with your existing income, you still meet the Medicaid income eligibility rules. Too much income can also cause you not to be "otherwise eligible." This could be a disastrous mistake that costs your family thousands!***

***CAUTION 2!!!***

***Always be sure to consult with a Medicaid planning attorney before purchasing a Medicaid annuity to verify that it is truly Medicaid compliant. The rules regarding these***

Here's what it might look like with Edward's case:

At the same time that Edward transfers $50,000 to his trust, he also purchases a Medicaid Annuity with his remaining $50,000. Medicaid counts the Medicaid Annuity as an income stream rather than a countable asset. As a result, Edward is now "otherwise eligible" because he has used up all of his excess assets or converted them from assets into income streams. As a result, the penalty period will begin running immediately. Of course, Edward will still have to pay private for his cost of care during the penalty period—that's what he'll use the annuity payments for.

As you can see from the cautions, Medicaid Annuities are a great tool, but it is absolutely critical that you work with a qualified Medicaid planning attorney to use them correctly - otherwise they can really backfire.

## Transfer to Irrevocable Trust with Give Back + Medicaid Annuity

What if you're still in a pre-planning context? If that's the case, then we don't want to purchase an annuity just yet, because we don't yet know when or if you are going to need nursing home care. Thus, in a pre-planning context, you may wish to transfer the full amount of excess funds to an irrevocable trust. If you continue to not need care in a nursing home for at least 60 months, then great! You just protected 100% of your assets.

If, however, you wind up needing nursing home care in less than 60 months, then we will make use of a "trap door" in your trust and give back some funds. Remember, though, that you can't give the funds directly back to yourself. The trust will actually gift the funds to a child or other beneficiary, who will then turn around and give them back to you. The gift from the trust to the child will create a penalty period. Once the funds are returned to you, you can use them to purchase a Medicaid Annuity which will cause you to then be “otherwise eligible” and start the clock running on the penalty period. The income stream from the annuity will cover your nursing home expenses during the penalty period.

Here’s what this might look like:

Blanche is 74 years old and lives in an apartment. Recently, Blanche has been diagnosed with Parkinson’s disease and though she’s still living on her own, her children are concerned that if her health declines she will need around the clock care in the future and may need to enter a nursing home.

Between Social Security and pensions, Blanche has a monthly income of $1,300. Blanche has total assets of $280,000.

Blanche likes the idea of using an irrevocable trust, but isn’t comfortable with transferring *all* of her assets to such a trust. So she sits down with her attorney and estimates how much she would be able to easily use up with a basic Medicaid spend down strategy—such as prepaying her funeral, doing some repairs on her car, upgrading her personal property (new television, radio, clothing, etc.). Based on these calculations plus a little extra “nest egg”, Blanche decides to set aside $35,000 that she can continue to use and if nursing home care winds up being needed, she will use the funds for her spend down.

After setting aside the designed “spend-down funds”, Blanche still has about $245,000 left to protect. She decides that she is comfortable placing $100,000 in an Irrevocable Income Only Trust, leaving her an additional “nest egg” of $145,000 outside of the trust in addition to her spend-down funds.

*Applying After Five Years:* If Blanches enters a nursing home after five years, the original transfer of $100,000 into the trust will no longer be included in the look back period, but Blanche still has an extra $145,000 to deal with. At this point, she could then use the ‘new’ half-a-loaf technique to protect about half of the

$145,000—or another $72,500. In total, Blanche protects almost 85% of her assets!

*Applying Before Five Years:* If Blanche enters a nursing home before the end of the five year look back period, then she and her attorney will need to run some calculations. In some cases, if she is close enough to the expiration of the five year period, she may be better off waiting it out (and paying out of pocket in the meantime) and possibly doing another half-a-loaf plan at the end of the five year period. In other instances, she may be better off sticking with her original transfer amount or only transferring a small additional amount.

Let's look at an example to better illustrate:

Blanche will have to report the $100,000 transfer in her "countable assets" because she's still within the five year look back period. The nursing home that Blanche is at costs $7,200 per month. For each month she is in the nursing home, she is going to use up $5,900 of her assets ($7,200 less her income of $1,300)—we'll call this the Net Monthly Expense. And for every $5,500 that Blanche transfers or gives away, she will penalized one month. Thus, Blanches total transfers should be calculated as follows:

*Countable Assets ÷ (Net Monthly Expense + Monthly Divisor) = # months*

*# months × Monthly Divisor = Total amount of gift/transfer*

So for Blanche, the numbers would look like this:

*$245,000 ÷ ($5,900 + $5,500) = 21.5 months*

*21.5 months × $5,500 = $118,200*

Since Blanche already transferred $100,000 to a trust, her ‘best outcome’ is to transfer about another $18,200 and then purchase a Medicaid Annuity with the remaining $126,800 which spread over 22 equal payments will yield a monthly payment of about $5,763 (without factoring in any interest to keep things simple). This may create a small shortfall of about $136 per month which Blanche’s children may help cover, or Blanche may readjust her calculations to create a slightly smaller gift so that her children won’t have to chip in.

Need proof that it works? Let’s reverse the calculation. If Blanche transfers a total of $118,200 she will be penalized for 21.5 months ($118,200 ÷ $5,000). That means that for about 21.5 months, she will have to pay out of pocket. The total cost of the facility is $7,200 of which her monthly income covers $1,300, leaving her with a shortfall of $5,900 each month. 21.5 months × $5,900 = $126,850.

Even though she didn’t make it the full five years, Blanche still protected well more than half of her assets (62.5% in the particular scenario).

As you probably can guess after going through the above scenario and calculations, every situation is going to be a little bit different. All of the figures need to be calculated carefully and different options need to be discussed before determining the best approach. Your elder law attorney should be able to create an Asset Protection Analysis walking you through the numbers and how much can be protected under the particular circumstances.

Depending upon health and finances, in a pre-planning context, some might put up to 100% in the irrevocable trust on the assumption that they will stay out of a nursing home for at least five years. If their guess is wrong, they can use the “trap door” of the trust that we previously discussed to access funds in an emergency.

## Gifting & Long Term Care Insurance

If you are still eligible for long-term care insurance, another technique is to purchase a policy providing five years of benefit, then gift or transfer as much as you’d like to family members or trusts. The insurance will provide enough benefit to cover the entire look back period and once the five years has expired, assuming you have no other excess assets, you can apply for Medicaid assistance. You may even be able to purchase a policy with decreasing coverage such that if you continue to stay healthy, your premiums can decrease. For example, in the first year, you pay for five years of coverage. In the second year, you only pay for four years of coverage (because one year has already passed since making your gifts/transfers). In the third year, you only pay for three years of coverage, and so on.

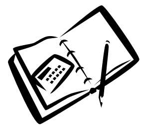
If you already have long term care insurance, then your existing policy should be factored in when determining the size of any gifts/transfers and the resulting penalty periods.

# Chapter Sixteen:
# Protecting Your Home

We've already mentioned a few planning tips and techniques regarding your home in previous sections, but for most people, their home is their largest and most important asset. Thus, I thought it might be worth devoting a section to go into the traps many fall into and tips to avoid them.

## Medicaid Estate Recovery

First, we've discussed it already, but it's worth repeating—Medicaid will not count your home as an asset while you are living, but upon your death, if it is included in your estate, it will be subject to the Medicaid estate recovery program. Thus, many of the strategies used will aim to ensure that the home is not part of your estate upon your death.



***QUICK REMINDER:***

***Although Medicaid will permit you to exempt your home for purposes of qualifying for benefits, you need to keep estate recovery in mind.***
***For many, their home is their largest investment and it's important that it be handled with care.***
***The proper strategy will depend upon the circumstances.***

## Don't Sell Or Transfer The Home!

A second word of caution, is do not sell the home until you've consulted with an elder law attorney. Many families panic when a loved one's health starts failing and think that the best option may be to sell the home so the funds from the sale can be used to pay for the nursing home, or they fall victim to the "coffee shop and hair salon" law and think that it's a good idea to transfer the home to a child or other family member. Most of the time, this is going to trigger substantial periods of ineligibility that could have been avoided and the family will be required to spend thousands of dollars paying for care out of pocket.

## Transferring To Children or Adding Children to Deed

Many families mistakenly assume that the best option is to transfer the home without realizing that this is a gift under both the IRS tax rules and for Medicaid qualification purposes. For Medicaid purposes, the value of the home will be divided by North Carolina's current monthly divisor ($5,500 as of this writing) and the result will be the number of months of ineligibility (i.e., the penalty period).

For example, let's assume that your home is valued at $225,000 and you decide to transfer it to your children. $225,000 divided by the monthly divisor of $5,500 per month is a penalty period of almost 41 months!

Furthermore, once you transfer the home to your children, it is now exposed to their life risks such as lawsuits, bankruptcies, divorce and so on.

Similarly, many parents think it's a good idea to add their son or daughter to their deed. Maybe you've even heard that this is a good way to avoid probate. It seems so simple, you just add the son or daughter to the deed right? But both the IRS and Medicaid will consider that to be a gift of 50% of the value of the home! Unless you specify an ownership or portion in the deed, such as "an undivided ten percent (10%) interest in the following property", it will be presumed that all owners own an equal share and thus will be considered a gift of 50%. If instead you added two of your children to the deed, it would be deemed a gift of 2/3 of the value of the home.

So, for example, if instead of transferring your $225,000 home to your child, you instead add your child to the deed, this is still going to be considered a gift of $112,500, resulting in a penalty period of about 20 months.

And, many people don't realize that gifts in excess of the IRS annual gift tax exclusion (currently $13,000) require the filing of a gift tax return.

While elder law attorneys do sometimes use planning strategies that involve transferring a partial interest in the home to children or family members, be sure to consult with an attorney before undertaking this technique on your own. It is fraught with landmines for the ill-informed.

## Using Life Estates

One method sometimes used is a life estate deed. With a life estate, you transfer the home to one or more children or family members, and you keep the right to live in the property for the rest of your lifetime. Upon your death, the property passes automatically to the children named in the deed (this is referred to as the "remainder interest").

Now, the remainder interest is still considered a gift, but the advantage of this approach is that it may reduce the size of the gift to your children. Instead of the value of the home being considered a gift, Medicaid will use Life Expectancy Tables based on the age of the person making the transfer to calculate the value of the remainder interest, and that portion will be deemed a gift. For example, the remainder interest of a home transferred by a 70 year old will be about 40%.

Another variation of the life estate technique would be to name an irrevocable trust as the owner of the remainder interest (remember, we can't use a revocable trust or Medicaid will consider it a countable asset).

## Sale or Transfer of a Small Interest in the Home

Your elder law attorney may recommend merely transferring or selling a very minor interest in your home to one or more of your children, such as five percent or less. Please be advised that this is *not* a technique to undertake on your own as it has to be done very carefully, using the proper form of ownership. Furthermore, as of this writing, there has been discussion in the elder law community of at least one county in North Carolina that is not permitting the use of this technique for Medicaid planning purposes. Nonetheless, I wanted you to know the technique exists in case your attorney brings up the topic. If the technique is still viable in your county, it can be a useful option.

## Transferring Home to an Irrevocable Trust

In a pre-planning context, it may be prudent to transfer the home to an irrevocable trust. Just like with transfers to children, this will be considered a gift and likely create a large penalty period, so this technique is generally only advised in a pre-planning context where we anticipate being able to wait out the 60 month look back period.

The advantage of this approach rather than transferring directly to children is that the home will not be subject to your children's lawsuits, creditors, divorce and the like. Plus, a trust can own property in various forms, so in the future, the home could be sold and the proceeds could be invested and as long as the account stays in the trust, the funds will still be protected. Furthermore, there may be some income tax advantages for holding the home in an irrevocable trust rather than transferring it directly to the children.

## Purchasing a Life Estate or Joint Interest In Your Child's Home

If you do not own your own home and it's possible to move into a child's home, then purchasing a life estate or joint interest in the child's home could be an effective technique. But, for the life estate approach to work, the parent must reside in the house for at least one year after the date on which the deed was signed, otherwise the entire purchase amount will be considered a gift. Whether it is more beneficial to purchase a life estate or a joint interest will depend on the particular circumstances and the age of the parent making the purchase.

## Using a Reverse Mortgage

For married couples, if the Community Spouse needs additional income, a reverse mortgage may be appropriate. Most people are used to a traditional mortgage—the bank lends you money to purchase a home. Over time, as you make monthly payments, your ownership interest in the home starts increasing until eventually, the entire loan is paid off. With a reverse mortgage, the bank instead sends you a check every month and the bank slowly accumulates a greater ownership in your home over time. These monthly payments are not considered 'income' for Medicaid qualification purposes. Thus, it can be a great way to generate additional cash flow for the Community Spouse and the house will continue to be an exempt asset.

Of course, the total amount of reverse mortgage payments made by the bank, plus interest, will need to be paid back to the bank eventually. Usually after both spouses have passed, the children will pay off the mortgage from other assets of the estate, or the house will be sold and the mortgage will be paid off from the sales proceeds.

## Family Member Moves Into Your Home

Remember that in our “Transfers Not Subject To Penalties” section we discussed various exceptions for certain transfers to children or siblings that may be permissible. If you missed it, be sure to go back and review that section.

# Chapter Seventeen: Medicaid Annuities

Annuities have become a popular investment vehicle for many. In its most basic form, you invest a certain amount of money with the financial institution selling you the annuity and in exchange, the company agrees to send you periodic payments over a specified time frame.

There are many types of annuities available, but for our purposes, I want to focus on what are known as “Medicaid Annuities” or “Medicaid Compliant Annuities.” They are also sometimes called “SPIAs” or “Single Premium Immediate Annuities.”
Before we dive in, let’s review some terminology:

> *Owner:* the person who has the right to change the beneficiary designation on the annuity.
>
> *Annuitant:* The person whose life expectancy is being used to calculate the annuity payments.
>
> *Beneficiary:* The person(s) or entity who receive any leftover annuity payments upon the death of the annuitant.
>
> *Guarantee period:* The period of time over which the annuity payments must be made, regardless of whether the annuitant dies before the end of the guarantee period. Typically, if there is no guarantee period, then the payments stop upon the death of the annuitant.

Remember when we covered the penalty period, I mentioned that the penalty period doesn’t start until you are in a nursing home and ‘otherwise eligible’—in other words, you’ve already spent down your assets. This is why the traditional half-a-loaf technique no longer works. But, if we use the half-a-loaf plus

Medicaid Annuity technique, this converts the extra assets from countable assets into an income stream.

## Requirements for Medicaid Annuities

For a Medicaid annuity to be a non-countable asset for Medicaid qualification purposes, it must strictly meet the following requirements:

*Immediate:* The annuity payments to the owner must start immediately upon purchasing the annuity.

*Fixed:* The payments must be regularly occurring and in an equal amount (i.e., you cannot have an annuity that is variable based upon market performance or one that includes a 'balloon' payment at the end).

*Irrevocable:* The annuity contract must be irrevocable, meaning that once you sign the contract, you cannot change its terms or get a refund of your money.

***These cautions are repeats from Chapter 15, but they are important and worth repeating:***

***CAUTION 1!!!***

***Be careful that when the monthly payments from the annuity are combined with your existing income, you still meet the Medicaid income eligibility rules. Too much income can also cause you not to be "otherwise eligible." This could be a disastrous mistake that costs your family thousands!***

***CAUTION 2!!!***

***Always be sure to consult with a Medicaid planning attorney before purchasing a Medicaid annuity to verify that it is***

*Non-transferable:* The owner cannot have the right to transfer ownership of the annuity to anyone else and it cannot be saleable.

*Medicaid must be named as successor beneficiary:* Under the new Deficit Reduction Act rules, for the purchase of an annuity not to be deemed a gift, the State's Medicaid department must be named as the successor beneficiary of any annuity payments that may continue after death of the annuitant. If there is a spouse or disabled child named as successor beneficiary, then Medicaid must be named next successor beneficiary after that person.

*Annuity Term:* The term over which the annuity payments are made should be based on the life expectancy of the annuitant. If the payment period is longer than the annuitant's life expectancy, then a portion of the annuity will be deemed a gift for Medicaid purposes.

## Medicaid Annuities & Income

Not only must the Medicaid Annuity meet all of the above requirements, but you must also be careful of your total income. If you combine the monthly annuity payment with your other income, such as social security and pensions, you must be sure that your total income stream does not cover or exceed your total cost of care. If it does, you will not be Medicaid eligible.

For example, let's assume that you are in a nursing home and the cost of care is $6,000 per month. Let's assume that after factoring your available exemptions, such as your Personal Needs Allowance, your combined social security and pension income of $1,800 per month. Typically, if you were eligible for Medicaid, what happens is Medicaid will expect you to contribute your excess $1,800 towards your cost of care and then Medicaid will pay the remaining cost of care ($4,200 per month, or more likely less because Medicaid typically pays the nursing home a discounted rate). Now, let's assume you have a substantial amount of excess assets and you use them to purchase a Medicaid Annuity. But, because of the size of the purchase and your life expectancy, the monthly payment is going to be $4,500 per month. In that case, the monthly payment of $4,500 combined with your other social security and pension income of $1,800 results in a total income stream of $6,300 per month that exceeds your monthly cost of care of $6,000. As such, you would not be eligible for Medicaid assistance.

As you can probably guess from the above list, the proper size, length, and format of the annuity that is appropriate depends on the factors of a particular situation. As such, I strongly recommend you work with an elder law attorney to make sure you get the right type of annuity for your needs.

## IRAs & Medicaid Annuities

Earlier we talked about a few of the difficulties in working with Individual Retirement Accounts (IRAs) for Medicaid planning purposes. If the account is liquidated, then income taxes must be paid upon liquidation. One option that is sometimes used if there are funds remaining in an IRA is to convert the IRA to a Medicaid Annuity. This typically can be done without liquidating the IRA and thereby being required to pay the income taxes. Instead, income taxes must only be paid on the annuity payments received in that calendar year rather than on the entire amount. This technique may permit you to continue to defer part of the income taxes and maintain a lower tax bracket overall.

Your attorney, financial advisor and accountant should be able to work together to estimate total tax liability and whether or not this would be an effective strategy for your circumstances.

# Chapter Eighteen:
# Filing The Medicaid Application

Many people like to save money by rolling up their sleeves and doing the work themselves instead of hiring a professional. For example, you might choose to change your own oil in your car or replace that leaky faucet yourself rather than hiring a plumber. But, when it comes to your Medicaid application, it frequently is to your benefit to hire a professional to assist you with the application process. Yes, I know that I appear to be a biased source, but hear me out:

First, many people have never had to file a Medicaid application or deal with the Medicaid department. This can be a time consuming and stressful process. By working with a professional, they can help make the process run smoother and handle most of the interactions with the Medicaid department.

Second, as previously shown, it is critical that the application be filed at the right time - otherwise you risk creating unintended penalty periods or having your application denied. A qualified elder law attorney can help ensure that your application is filed at the correct time.

Third, an elder law attorney can help you come up with the best plan for qualification - including helping you come up with an appropriate spend down plan plus, if necessary, developing a plan to protect as much of the excess assets as possible.

Finally, in many cases, ***it doesn't actually cost you anything additional out of pocket to hire an elder law attorney to prepare the application!*** Sounds too good to be true, right? Remember when we talked about a spend down plan, and that it was okay to pay for compensated services? Well, that includes legal services! So, let's assume for example, that you are either already in or about to enter a nursing facility that costs $5,500 per month. And in this particular scenario, we'll assume that you have already come up with a spend down plan, but you still have $33,000 in excess assets—enough to cover 6 months of care at the nursing facility. So, if you private pay the nursing home for 6 months, you'll wind up spending $33,000 out of pocket.

***FINANCIAL ALERT!!!***

***Legal fees are a permissible "spend down" expense. Thus, although you must pay the lawyer for his or her services, if the money would have otherwise gone towards the cost of the nursing home, it typically doesn't end up "costing" you anything out of pocket to hire the lawyer.***

Now, in keeping with round numbers, let's also assume that the cost for an attorney to prepare the Medicaid application is $5,500. If you spend $5,500 paying the lawyer to prepare your Medicaid application, this will reduce your assets to $27,500 and you'll wind up paying the nursing home private for 5 months instead of 6 months. The net result to you is a breakeven—in both scenarios you paid a total of $33,000. Iin the first scenario it all went to the nursing home, but in the second scenario part went to the nursing home and part went to the attorney—all while saving you and your family a great deal of time and aggravation.

# Chapter Nineteen: Veteran's Aid & Attendance: The Basics

The Veterans Administration (VA) operates several benefit and pension programs. For purposes of this book, we are only going to talk about one of those programs, but it is a great program for senior veterans and their spouses or widows. Unfortunately, many that may be eligible for the program aren't even aware of its existence.

In its most basic form, the pension is intended, when combined with the veteran's other income and social security income, to bring the veteran's income up to a certain minimum income level established by Congress.

To qualify for the program, the veteran upon which the pension is to be based, must meet certain service-connected requirements, along with certain asset and income tests.

## Service-Connected Requirements

To be eligible for the program, the veteran must have served on active duty for at least 90 days. Out of those 90+ days, at least one of them must have been during a designated active war time. Note that this does <u>not</u> require that the veteran actually served on the front lines or in combat, it merely requires that the veteran was in service and on active duty during the wartime and was honorably discharged.

| War/Conflict | Beginning/End Dates |
|---|---|
| World War II | December 7, 1941 to December 31, 1946 |
| Korean Conflict | June 27, 1950 to January 31, 1955 |
| Vietnam Era | August 5, 1964 to May 7, 1975; for veterans that served in Vietnam February 28, 1961 through May 7, 1975 |
| Gulf Wars | August 2, 1990 – Date Not Yet Determined (to be set by future law or Presidential Proclamation) |

## Medically Needy Test

If the veteran is under the age of 65, he or she must be permanently and fully disabled to qualify for the pension. If the veteran is age 65 or older, there is no disability requirement. If the applicant is a surviving spouse of a veteran, it does not matter whether the veteran was disabled.

## Benefit Levels

The lowest level of the program is referred to as "basic pension," but there are higher benefit levels that provide additional income if a veteran qualifies. The next step above basic pension is known as "*housebound*" pension.

If a veteran qualifies as being housebound due to his or her disability, then the veteran may qualify for the housebound level of the pension.

And if the veteran or surviving spouse is (1) blind or nearly blind; (2) a patient in a nursing home or skilled nursing facility due to mental incapacity or physical incapacity; or (3) otherwise proves the need for another person to assist the applicant with performing basic daily functions such as bathing, feed, dressing and toileting, then the applicant may qualify for the highest pension level, otherwise known as "*aid and attendance*."

To qualify for the housebound or aid and attendance benefit levels, the applicant will be required to obtain a medical review and approval by the VA.

As of writing of this book, the benefit levels are:

| **Applicant** | **Basic** | **Housebound** | **Aid & Attendance** |
|---|---|---|---|
| Single Veteran | $1,021/mo. $12,555/year | $1,248/mo. $14,977/year | $1,703/mo. $20,446/year |
| Married Veteran | $1,337/mo. $16,050/year | $1,564/mo. $18,772/year | $2,019/mo. $24,238/year |
| Surviving Spouse | $684/mo. $8,218/year | $837/mo. $10,045/year | $1,094/mo. $13,136/year |

There may be additional allowances if the veteran has dependent children (generally this means having children that are disabled or mentally retarded).

If the applicant is a surviving spouse of a veteran, the surviving spouse must have been married to the veteran at the time of the veteran's death and must not have remarried since the veteran's death (unless the surviving spouse remarried and then divorced before November 1, 1990).

## Income Test

Okay, this part can start to get a bit confusing, but let me try to break it down. The Maximum Allocable Pension Rate (MAPR) is the maximum annualized benefit for each category you see in the benefit table in the prior section (i.e., the MAPR for a Single Veteran, Basic Level Pension is $12,555, the MAPR for a Married Veteran Aid & Attendance Level Pension is $24,238).

The basic rule is that if your countable income for VA purposes (we'll call it the IVAP) exceeds the MAPR, you will not be eligible for benefits.

How is the IVAP determined? Basically it will include income from all sources including social security and pensions. *BUT*, if you have qualified unreimbursed medical expenses, those can be subtracted from your income for purposes of determining the IVAP. Examples of such expenses include recurring prescription costs that are not covered by health insurance and the cost of home care being provided by a professional, family member (other than spouse) or friend. Or, if the veteran is in an assisted living facility, part of the facility fee may be designated as "medical services" and part will be designated as "room and board." The "medical services" portion qualifies as a medical expense.

The VA calculates a general medical expense deduction that is equal to 5% of the MAPR. Any medical expenses in excess of that deduction will reduce the IVAP.

Here's an example to give you an idea of how this works:

Let's assume we have a married veteran that has qualified for the Aid & Attendance medical rating. They have combined monthly income of $4,100 from social security and pensions. Thus, our starting annual income is $49,200 per year. Now, let's assume that the veteran is living in an assisted living facility at a monthly cost of $3,750. The veteran went through a medical evaluation and was medically rated as needing the assisted living care. As such, the entire amount will count as a recurring medical expense. In addition, the couple is paying $125 out-of- pocket per month for prescriptions. In total, the couple has out-of-pocket medical expenses of $3,875 per month or $46,500 per year.

The MAPR for a married couple is $24,238. Thus, the medical expense deduction is $1,211.90 (5% of $24,238).

Subtract the deduction from the couple's annualized medical expenses of $46,500 per year and the allowable medical expenses are $45,288.10.

Subtract the allowable medical expenses from the couple's annualized income $49,200 to determine the IVAP: $3,911.90

To calculate the pension benefit, subtract the IVAP from the MAPR: $20,326.10 per year (or about $1,693 per month).

Note that if after running the calculations the resulting IVAP is equal to zero or is a negative number, this means that the applicant qualifies for the maximum pension amount for that particular category.

For example, let's assume that instead of annual income of $49,200 per year, the couple had annual income of $40,000 per year. Subtract the allowable medical expenses of $45,288.10 from $40,000 and the result is (-$5,288.10) meaning that the couple would qualify for the full aid and attendance pension amount of $24,238 (or $2,019 per month).

## Asset Test

Unlike the Medicaid rules which have clearly specified asset limits, the asset limits for VA purposes are not as clear cut. Frequently in materials about the Aid & Attendance program, you'll see reference to $80,000. That is because the VA manual requires that if a Veterans Service Representative approves benefits for a household with assets exceeding $80,000 it is subject to review and the representative must file additional paperwork justifying their decision.

The true rule is a little bit more fuzzy though. It basically says that the veteran (or widow) needs to have less than “sufficient means.” Thus, for a single veteran or a veteran with a low life expectancy, it could be possible for the VA to establish a lower asset limit.

In general, the VA program is similar to Medicaid in that it will let you treat your home, automobile and personal property as non-countable, though there are some slight variances here and there, such as determining what constitutes the home place if it is part of a larger tract of real estate.

Retirement accounts such as IRAs receive a somewhat unfavorable treatment under the VA rules—the total account will be considered a countable asset. But if you are over the age 70 ½ and are taking Required Minimum Distributions (RMDs), the RMDs will be considered countable income. This generally can be mitigated through the use of an annuity which we will discuss in the next section.

# Chapter Twenty: Veteran's Aid & Attendance: Planning Techniques

## Transfers

The good news is that the VA currently does not impose a penalty period if you transfer or gift assets (though it is rumored that they may change this in the future). However, the gifts or transfers must be made to someone that does not reside in the veteran's household.

The bad news is that many people get so excited about qualifying for the VA program that they make substantial gifts or transfers to qualify. Then a few months or years later their health gets worse and they need to be in a nursing home and apply for Medicaid—only to be slapped with a hefty penalty period by Medicaid for the gift or transfer they made for VA planning purposes. Thus, it is strongly recommended that you consult with an elder law attorney to find the appropriate balance between planning for VA Aid & Attendance and future Medicaid benefits.

## No Life Estates or Income Only Trusts

While life estates and income-only trusts will work for Medicaid purposes, the VA takes a very strict approach—the applicant cannot retain any ownership interest over the asset. Thus, if the applicant retains a life estate in real estate or moves assets to a trust from which he has the right to take income, the VA will count all of the real estate or assets.

## Irrevocable Trusts

In certain instances, if the veteran and/or spouse are willing and able to permanently transfer assets to an irrevocable trust, then this is a possible planning technique. The use of trusts for VA planning purposes must be done very carefully, however, as the VA takes a very strict view of trusts.

If used properly, an irrevocable trust can be designed to accommodate both VA pension and Medicaid qualification. An added benefit of using a trust over a transfer or gift to children or other family members is that the trust can be designed in such a way as to “undo” the transfer, if Medicaid eligibility is needed sooner rather than later and we need to undo the penalty period.

## Add Others to Your Accounts

Under the Medicaid rules, if you added one or more children to your accounts, it would be considered a gift and would be subject to imposition of a penalty period. However, because the VA does not impose transfer restrictions or penalty periods, one method to quickly reduce assets is to add children or other family members to your accounts.

But be forewarned, this creates other risks. First, it exposes your accounts to your children’s lawsuits, creditors, divorce and indiscretions. Second, there is always the risk that your child will not be able to resist temptation and will spend some or all of the funds. Finally, if you ever need Medicaid benefits, this will be considered a gift and a penalty period will be imposed.

## Annuities

Another effective technique is to use excess assets to purchase an annuity. This turns the excess assets into an income stream. So long as the annuity is irrevocable (i.e., the applicant can’t get a refund on part or all of his original investment), then it will not be a countable asset. Rather, the payments will count as income for qualification purposes.

But again, be forewarned. First, you must be sure that the income stream created by the annuity doesn't increase your income such that you no longer qualify for the VA pension or the amount you qualify for is severely diminished.

Second, while the VA's rules regarding annuities are much more flexible than the Medicaid rules, unfortunately there are many so-called "financial advisors" that do nothing more than peddle annuities for VA planning purposes. If these annuities are not Medicaid-compliant, this strategy can really back-fire in the long run and could wind up costing you and your family thousands!

## VA Pension Benefits & Medicaid

If Medicaid benefits are later applied for and received, the VA pension benefit will be reduced to $90 per month. Generally, if eligible, Medicaid benefits will exceed the VA pension benefits. Although the pension amount is reduced, the applicant generally comes out in a better position. For example, suppose the applicant receives total income of $1,500 from Social Security after allowing for his Personal Needs Allowance. He is in a nursing home that costs $6,000 per month. Under such a scenario, the monthly VA pension benefit of $1,703 per month will not go nearly as far as Medicaid potentially paying the entire $4,500 "gap" between the applicant's cost of care and monthly excess income.

## VA Pension Application

To receive benefits under the VA pension program, a completed application must be submitted along with required documentation and attachments. Similar to the Medicaid application, this can be fairly intimidating and stressful to assemble.

In addition, the time it takes to receive approval of benefits can vary greatly. Occasionally an application will be approved in as little as two to three weeks, but most of the time it takes months, frequently as much as 9 to 12 months.

Once approved, the benefits will be retroactive to the date of application. Thus, if it takes the VA 9 months to complete their review of your application and approve you for benefits, your first check will be a lump sum for 9 months of retroactive pension benefits.

A few words about who can prepare the application: First, the applicant can prepare his or her own application. Or, an agent acting under a power of attorney can prepare the application on the applicant's behalf. Certain Veterans service organizations (American Legion, Veterans of Foreign Wars, Disabled American Veterans), veterans benefits counselors, and agents accredited by the VA may assist with the preparation of the application. And, attorneys that have been accredited by the VA may also complete the application on behalf of an applicant.

If someone (other than an agent under a power of attorney) is assisting you with the preparation of your application, they must be VA accredited, so be sure to ask.

Finally, the VA prohibits the charging of a fee for assisting in the preparation of the VA application for benefits. To clarify—an attorney may charge fees associated with other work such as estate planning, legal advice regarding Medicaid and VA qualification, or planning to help you become eligible for benefits, but they cannot charge a fee for the actual preparation of the application.

## About the Author

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*Estate Planning &*
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Jackie Bedard's estate planning and elder law practice is focused on guiding clients through the complicated, often confusing, maze of balancing long term care planning, family protection, wealth preservation, and cherished family values in the planning process.

Jackie is the author of various other books, reports, and resources that can be found at www.CarolinaFEP.com, including *The 12 Most Common Threats to Your Estate & Your Family's Future*, *Understanding the VA's Aid & Attendance Pension Program and How It Could Save Your Family Thousands*, and *The Parents' Peace of Mind Guide*.

Jackie is a member of the National Network of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, and the Medicaid Planning Network. Locally, Jackie is a member of the North Carolina Bar Association, and in on the Board of Directors of Guiding Lights Caregiver Support Center.

Jackie earned her Bachelor's of Science degree in Economics at the Massachusetts Institute of Technology and graduated law school magna cum laude in the top 7% of her class at the University of Richmond School of Law.

Jackie resides in Cary with her husband, Dan, and their two dogs, Kylie and Nelly. She is actively involved in the community, a women's investment club, and civic and networking groups. Jackie also enjoys CrossFit, reading, hiking, cycling, music, and more.

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## Medicaid Reference
## (Updated as of 1/1/2013)

| | |
|---|---|
| Monthly Divisor | $6,300 per month |
| Individual Resource Allowance | $2,000 |
| Monthly Personal Needs Allowance | $30 |
| Minimum Community Spouse Resource Allowance | $23,184 |
| Maximum Community Spouse Resource Allowance | $115,920 |
| Minimum Monthly Maintenance Needs Allowance | $1,891 |
| Maximum Monthly Maintenance Needs Allowance | $2,898 |
| Shelter Standard | $567 |
| Standard Utility Allowance | $329 |
| Resource Allowance for Couple (both reside in a facility) | $3,000 |

# Veteran's Pension Reference (Updated as of 1/1/2013)

| Wartime Veteran (Single) | | |
|---|---|---|
| **Type of Benefit** | **Maximum Pension** | **Maximum Pension** |
| Basic Pension | $1,037 per month | $12,448 per year |
| Housebound Pension | $1,269 per month | $15,231 per year |
| Aid & Attendance Pension | $1,732 per month | $20,795 per year |

| Wartime Veteran (Married) | | |
|---|---|---|
| **Type of Benefit** | **Maximum Pension** | **Maximum Pension** |
| Basic Pension | $1,359 per month | $16,340 per year |
| Housebound Pension | $1,590 per month | $19,091 per year |
| Aid & Attendance Pension | $2,054 per month | $24,648 per year |
| Veteran Married to Veteran (Aid & Attendance) | $2,676 per month | $32,123 per year |

| Surviving Spouse of Wartime Veteran | | |
|---|---|---|
| **Type of Benefit** | **Maximum Pension** | **Maximum Pension** |
| Basic Pension | $696 per month | $8,359 per year |
| Housebound Pension | $851 per month | $10,217 per year |
| Aid & Attendance Pension | $1,113 per month | $13,362 per year |

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