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FPA Central Ohio November 13, 2018 Maggie L. Sutton

Fact Pattern:

Married couple. Wife is 75, husband is 81. Husband shows signs of dementia and recently fell and broke his hip. He was hospitalized on November 1, 2018, had surgery, and then transferred to a rehab facility. He is likely to either remain at the nursing home or come home and need in-home care. The couple has the following assets:

Asset	Owner	Value
Home	Revocable Living Trust	\$200,000 (Auditor's value)
Car	Husband	\$ 5,000
Checking and Savings Accounts	Joint	\$10,000
Brokerage Account	Joint	\$50,000
IRA	Wife	\$65,000
IRA	Husband	\$100,000
Total Assets		\$425,000

Goal: The couple would like to preserve assets for the wife. What planning can be done?

For Medicaid purposes, their countable assets total \$225,000.

Asset	Value
Checking and Savings Accounts	\$10,000
Brokerage Account	\$50,000
IRA-Wife	\$65,000
IRA-Husband	\$100,000
Total Countable Assets	\$225,000

The home is exempt for Medicaid purposes, even though owned by an RLT. So long as the principal of the RLT is available to the couple, the assets in the Trust will be treated the same

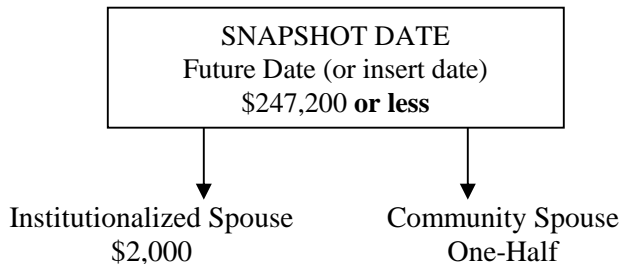
as if the resources were owned by the individual or the individual's spouse. One car is also exempt regardless of the value.

Additionally, the home will be exempt so long as the wife continues to live in the home. If the wife dies or goes into long-term care herself, the home may lose its exemption, unless a "dependent relative" lives in the home or either the husband or wife has an "intent to return" to the home. This is a change, as there is no longer a 13-month exemption.

If both of the spouses entered long-term care and neither of the above exemptions applied, you used to be able to list the property for sale and it would be considered exempt. Another change in the regulations is that property listed for sale is no longer exempt while listed, although I recently argued successfully that three parcels listed for sale are not resources that are readily convertible to cash and therefore are exempt. However, there are other appeal decisions that state the opposite – it is still countable even though listed for sale.

Snapshot Date

The concept of a snapshot date only applies to married couples because a single individual must spend down to \$2,000. A community spouse is entitled to keep a portion of the marital assets, so this concept of a snapshot date is used to determine how much the community spouse can keep.



The snapshot is a "photograph" of the countable assets as of the first date one spouse enters a long-term care facility (LTCF) and stays for at least 30 days. The snapshot date is the first day of hospitalization if the patient directly transfers from the hospital to the nursing home.

In our fact pattern, assuming the husband did not have a previous hospitalization or institutionalization, the husband's snapshot date was November 1, 2018, when he was hospitalized for the broken hip since he transferred directly to a rehab facility and has an intent to remain there until at least December 1. Therefore, we would need to know the value of all of the above assets as of November 1. For purposes of this scenario, we will assume that the amounts listed above are as of December 1.

Analysis:

To qualify the husband for long term care, the couple would have to spend down their countable resources to under \$114,500 ($\$225,000 / 2 + \$2,000$). The absolute maximum amount a married couple can have is about \$125,600 (if assets exceeded \$247,200 as of snapshot date).

It's possible for the couple to make certain spenddowns:

- Prepaid funeral plan for both, and even for immediate family members – no limit on amount spent
- New(er) car for the wife, even if she doesn't drive anymore
- Home improvements and repairs to the home
- Purchase of personal property – furniture, jewelry, clothing
- Pay down debt – mortgage, credit card debt, car loans, etc.

Let's assume that all of the above expenditures resulted in \$20,500 in spenddowns. This leaves \$90,000 left to spend down. ($\$225,000 - \$114,500 - \$20,500$).

A majority of their countable assets is held in their IRAs. Liquidating them completely in one calendar year would cause negative income tax consequences, so that is not ideal.

The Medicaid recipient will only be able to have up to \$2,000 a year after becoming eligible. Because of this requirement, it would probably be wise to liquidate a portion of his IRA this year (potentially one half), and then liquidate the other half in 2018 to spread the income tax out over two years. I always recommend that my clients discuss this with their financial advisors and tax professionals.

Because of the change in the Medicaid regulations, it is now permissible for the community spouse to purchase a Medicaid-compliant annuity (MCA) after the snapshot date. Therefore, the wife could annuitize her IRA so she does not have to liquidate it. In order for the annuity to be Medicaid-compliant, it must be actuarially sound, meaning that the term of the annuity cannot exceed her remaining life expectancy (12.8 years per the SSA) and it must name the State of Ohio as the primary beneficiary to the extent benefits are paid on behalf of the institutionalized spouse (her husband) or the annuitant. This annuity will generate an additional \$424 of income for the wife per month.

She could annuitize the IRA for a shorter period of time, maybe eight years. This would generate an additional \$677 per month. You must take into account the actual life expectancy of the wife. If she is not healthy and may not outlive her husband, the length of the annuity could be much shorter than estimated life expectancy. *CAVEAT:* Some counties are challenging these "short term" annuities on the basis they are not actuarially sound since they are shorter than the SSA determination of life expectancy. Recently though, the administrative appeals have favored the applicants and determined that a period shorter than the SSA figure is considered actuarially sound.

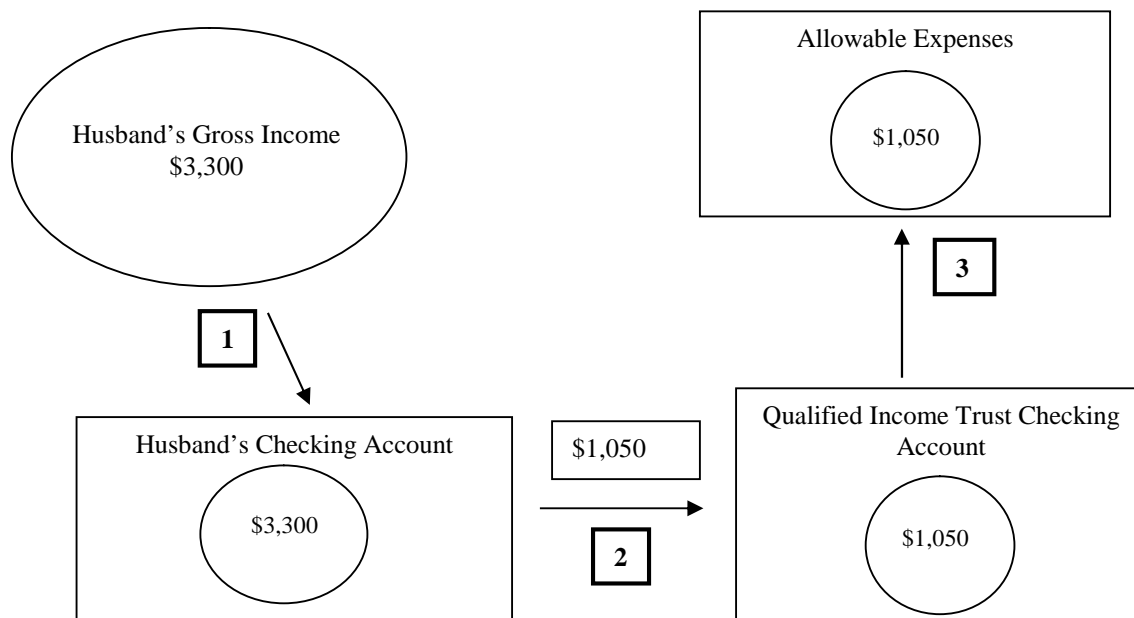
The wife will have to spend down an additional \$25,000. She could purchase a second MCA for \$25,000. If this paid her income over an eight-year period like the other annuity, this would generate another \$260 in income. The wife will get to keep all of the income generated from these annuities, as well as her current income (social security and/or pension). However, she may previously have been entitled to a portion of her husband's income if her monthly income was less than \$2,060. With the annuity income, if her income is greater than \$2,060, she may not receive any additional income of his.

The above planning is the quickest way to eligibility for this married couple. Remember though, the couple still needs to consider tax planning, as the husband's IRA will need to be liquidated and all the funds transferred to the wife by the one-year anniversary of Medicaid eligibility because he must have less than \$2,000 in his name at that time.

Income:

As part of the 1634 transition, the regulations changed how an individual's income is analyzed for eligibility purposes. If an individual is seeking Medicaid coverage for long-term care benefits (PASSPORT, Assisted Living Waiver, or nursing home) and their total gross income exceeds \$2,250, they must have a Qualified Income Trust (QIT) in place in order to be income-eligible.

If husband's gross monthly income was \$3,300 from all sources, he would require a QIT. Below is a diagram on how the QIT works. In addition, please refer to the QIT document attached.



Once the husband's monthly income is deposited into his current personal checking/savings account, he must transfer the amount of his gross income in excess of \$2,250 to the QIT account. In our example above, he must transfer at least \$1,050 to the QIT account. From the QIT account, the trustee (likely the wife in our scenario) can then pay the nursing home or other medical providers. The funds that go into the QIT account each month should be used for care and the QIT account should carry a very low balance, if any balance at all each month.

Other Changes to Medicaid:

See handout for additional changes to the Medicaid regulations, effective August 1, 2016.

Changes to VA regulations, effective Oct. 18, 2018:

- Implementation of a three-year lookback period for transfer/gifts made on or after Oct. 18, 2018 (gifts made before this date will not affect eligibility)
 - o Penalty period cannot exceed more than five years
 - o Penalty period divisor to calculate penalty period is highest pension rate available at the time of application (veteran with a dependent – usually spouse), which is currently \$2,169. Therefore, once a transfer of more than about \$78,000 occurs, claimant will be better off waiting three years before applying than serving the penalty period associated with the transfers.
- Capping the net worth limit at \$123,600 for all applicants – doesn't matter if it is a single veteran, married veteran, or a surviving spouse
 - o The home (up to 2 acres), one car, and personal property are exempt.
- Net worth is the total of your countable assets plus your “income for VA purposes”
 - o “Income for VA purposes” is your total household gross income minus unreimbursed medical expenses. This amount cannot be less than \$0.
 - o If your “income for VA purposes” is \$0, you can keep up to \$123,600 of assets. If your income is \$10,000, you can only keep up to \$113,600 of assets.
- Definition of “medical expense” has been changed and includes specific expenses that can be deducted from income to arrive at your “income for VA purposes.”

QUALIFIED INCOME TRUST

This declaration of trust made this ____ day of _____, 20__, by _____ (Grantor-name of person establishing the Trust), is to be known as the _____ (name of the Primary Beneficiary) Qualified Income Trust (QIT), and is to be governed by the terms set forth below. The identification number for the Qualified Income Trust is the Primary Beneficiary's social security number.

Article I

Trust Purpose. This is an irrevocable Qualified Income Trust, sometimes referred to as a "Miller Trust", and is authorized by 42 U.S.C. §1396p(d)(4)(B). The purpose of this Trust is to enable the Primary Beneficiary to qualify for medical assistance ("Medicaid").

Article II

Trust Funding. The property to be placed in the Trust is monthly income received by the Primary Beneficiary including income from the following source(s):

- | | |
|----------|----------|
| 1. _____ | 3. _____ |
| 2. _____ | 4. _____ |

No property other than the Primary Beneficiary's income may be placed in the Trust. Income must be deposited into the trust account during the same month in which the income is received by the Primary Beneficiary.

Article III

Trust Distributions. No expenditures shall be made from the Trust except in accordance with this paragraph. The trustee shall make distributions from the trust only in amount and for the purposes necessary to maintain income eligibility of the Primary Beneficiary for Medicaid. Consistent with the requirements of the Medicaid program that require all income including any income that is not placed in the Trust be used for post eligibility expenses, the Trustee shall make payments from the Trust in the following priority, no later than the last day of the calendar month in which the income is received by the Trust:

1. A monthly personal or maintenance needs allowance for the Primary Beneficiary;
2. A maintenance allowance for the spouse, if any, of the Primary Beneficiary and, if applicable, a maintenance allowance for family dependents;
3. Incurred medical expenses of the Primary Beneficiary. In accordance with rule 5160:1-3-04.3 of the Administrative Code, when income is used to help pay for long term care services or other medical care provided to the individual, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for other medical care

provided to the individual and to the extent that the payments purchased care at fair market value;

4. The Trustee may also make payments from the Trust for bank fees, attorney fees, and other expenses required to establish and administer the trust in a reasonable amount up to fifteen dollars per month or as otherwise authorized under Rule 5160:1-6-03.2 of the Ohio Administrative Code.

Article IV

Trustee. The Trustee shall administer this Trust in good faith to effectuate its purpose, and shall act in accordance with the terms of the Trust and with all applicable laws including, but not limited to Chapters 5801. to 5811. of the Ohio Revised Code. These powers include the power to open and manage accounts with any bank, credit union, or other financial institution. The Trustee shall complete attached Certification of Trust document and take it to the bank to open the QIT account. The Trustee shall not be required to furnish bond nor to obtain leave or confirmation from any court or other person whatever before exercising or performing any such powers. No person dealing with the Trustee shall be obligated to inquire into the Trustee's authority for any action proposed. The initial Trustee is _____. If the initial Trustee resigns, becomes deceased or is otherwise unable or unwilling to serve, then _____ shall serve as successor Trustee. Any Trustee may, while serving as Trustee, appoint one or more successor trustees.

Article V

No Transfers or Assignments. The Trust's assets, income and distributions shall not be anticipated, assigned, transferred or encumbered in any manner. The Primary Beneficiary shall not have the power to anticipate, assign, transfer or encumber the Primary Beneficiary's interest in the Trust, nor shall such interest, while in the possession of the Trustee, be liable for, or subject to the debts, contracts, obligations, liabilities or torts of the Primary Beneficiary.

Article VI

Termination. This Trust shall terminate upon the death of the Primary Beneficiary, at which point the remaining Trust property shall be distributed to the Ohio Department of Medicaid or its successor up to an amount equal to the total medical assistance paid on behalf of the Primary Beneficiary; the Trustee is prohibited from repaying other persons or creditors prior to this distribution. Any remaining Trust property after the Ohio Department of Medicaid (or its successor)'s claim has been paid shall be distributed to the estate of the Primary Beneficiary.

Signed and dated on _____, 20_____.

Grantor

Trustee

CERTIFICATION of TRUST
(Ohio Revised Code Section 5810.13)

_____, as Grantor, and _____, as Trustee, entered into The
_____ (Primary Beneficiary) Qualified Income Trust on _____, 20__.

- I. **Trustee.** _____ is the current Trustee of this trust. His/Her current address is _____.
- II. **Limitation of Liability.** I understand that Ohio Revised Code Section 5810.13(G) states that a person who acts in reliance upon this Certification (without knowledge of incorrect representations in the Certification) is not liable to any person for so acting and may assume without inquiry the existence of the facts in this Certification.
- III. **Powers of Trustee.** In addition to all other powers granted by law and stated in the Trust, the Trustee shall have the following powers and discretion:
- A. The Trustee shall administer this Trust in good faith to effectuate its purpose, and shall act in accordance with the terms of the Trust and with all applicable laws including, but not limited to Chapters 5801 to 5811 of the Ohio Revised Code.
 - B. The Trustee has the power to open and manage accounts with any bank, credit union, or other financial institution.
 - C. The Trustee shall not be required to furnish bond nor to obtain leave or confirmation from any court or other person whatever before exercising or performing any such powers.
 - D. No person dealing with the Trustee shall be obligated to inquire into the Trustee's authority for any action proposed.
 - E. Generally, the Trustee has authority to do all acts and to exercise all rights powers and privileges that an absolute owner of the property would have, subject to the discharge of their fiduciary obligations and subject to any limitations specified in this agreement.
- IV. **Revocability.** This trust is irrevocable.
- V. The trust has not been revoked, modified or amended in any way that would cause the representations in this Certification of Trust to be incorrect. This Trust still exists.
- VI. The taxpayer identification number (TIN) for this trust is the Primary Beneficiary's social security number.

Signed and dated on _____, 20_____.

Trustee

THE 2016 OHIO MEDICAID MANUAL

Summary of Changes for 2016

After the transition to 1634, Ohio's Medicaid rules can be found in the following sources:

1. Ohio Administrative Code: 5160:1
2. Ohio Revised Code: 5162
3. Code of Federal Regulations: 20 C.F.R. 416
(https://www.ssa.gov/OP_Home/cfr20/416/416-0000.htm)
4. SI POMS: 005-040
(<https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttcategory=05>)

Pre-2016

Change		Code Reference	Ohio Medicaid Manual Reference
1.	MAGI – January 1, 2014	OAC 5160:1-4-01 and 42 C.F.R. 435.603	OMM Chapter 18
	<ul style="list-style-type: none"> • No resource test, only income test 		
	<ul style="list-style-type: none"> • Transfer of asset test if individual in NH 		
	<ul style="list-style-type: none"> • Spouse's income is excluded for HCBS 		
	<ul style="list-style-type: none"> • No patient liability in any long-term setting (NH, HCBS) 		

January 2016

Change		Code Reference	Ohio Medicaid Manual Reference
1.	Partial reconveyance to reduce/shorten penalty period is no longer permissible	OAC 5160:1-3-07.2	OMM Chapter 7
2.	Rebutting presumption of improper transfers is no longer by clear and convincing evidence	OAC 5160:1-3-07.2	OMM Chapter 7
3.	Promissory note must be paid in full	OAC 5160:1-3-05.5	OMM Chapter 10

February 2016

Change		Code Reference	Ohio Medicaid Manual Reference
1.	Home in trust issue resolved	MEPL 107 and MEPL 108	OMM Chapters 4 and 8
2.	Home (and other excludable resources) owned by revocable living trust is an exempt resource	MEPL 107 and MEPL 108	OMM Chapters 4 and 8

March 2016

Change		Code Reference	Ohio Medicaid Manual Reference
1.	Purchase of annuity by community spouse post-snapshot is permissible	MEPL 112	OMM Chapter 9

June 2016

Change		Code Reference	Ohio Medicaid Manual Reference
1.	ABLE accounts are exempt assets	26 U.S.C. 529A, R.C. 113.50, and SI POMS 01130.740	OMM Chapter 4

August 2016

	Change	Code Reference	Ohio Medicaid Manual Reference
1.	Conversion to 1634 State	OAC 5160:1-3-04.1	OMM Chapter 1
	<ul style="list-style-type: none"> • End of spenddown program 	OAC 5160:1-3-04.1	OMM Chapter 4
	<ul style="list-style-type: none"> • If income greater than Special Income Level (\$2,199), must establish Qualified Income Trust 	OAC 5160:1-3-04.2 and OAC 5160:1-6-03.2	OMM Chapters 4 and 8
	<ul style="list-style-type: none"> • Individual may have up to \$2,000 (up from \$1,500). 	OAC 5160:1-3-05.1	OMM Chapter 4
2.	Changes to QIT regulation - more rules governing QITs	OAC 5160:1-6-03.2	OMM Chapter 8
3.	Patient Liability calculation allows for reduction for QIT expense (\$15 or higher if permitted by JFS)	OAC 5160:1-3-04.3	OMM Chapters 6 and 8
4.	VA Aid and Attendance no longer excluded as income	OAC 5160:1-3-03.2 (OAC 5160:1-3-03.11 rescinded)	OMM Chapter 4
5.	Exempt resources		
	<ul style="list-style-type: none"> • Home titled in individual's name, individual spouse's name, or titled in revocable trust in new regulation 	OAC 5160:1-3-05.13	OMM Chapter 4
	<ul style="list-style-type: none"> • If single individual leaves home for ALF or NH, must have intent to return to remain exempt asset <ul style="list-style-type: none"> ○ Home will remain exempt as long as "dependent relative" continues to reside in home 	OAC 5160:1-3-05.13	OMM Chapter 4
	<ul style="list-style-type: none"> • Real property listed for sale no longer exempt asset (but arguably has 9 months to attempt to sell per POMS) 	OAC 5160:1-3-05.15 rescinded and SI POMS 01150.201 and 01130.140	OMM Chapter 4
	<ul style="list-style-type: none"> ○ Acceptable sales price of real property no longer defined, but POMS states that a sale for two-thirds of the current market value is reasonable 	OAC 5160:1-3-05.15 rescinded and SI POMS 01150.201	OMM Chapter 4
	<ul style="list-style-type: none"> • One car, regardless of value, is exempt so long as it's used for transportation (use doesn't matter for married couple) is exempt 	OAC 5160:1-3-05.11	OMM Chapter 4
	<ul style="list-style-type: none"> • Up to \$1,500 specifically segregated from other assets and designated as burial funds are exempt 	OAC 5160:1-3-05.6	OMM Chapter 4
	<ul style="list-style-type: none"> • Retirement funds of ineligible spouse, when both spouses are living together, are not deemed 	OAC 5160:1-3-03.10 and OAC 5160:1-3-05.20	OMM Chapter 4
6.	Community Spouse annuities post-snapshot are permitted in regulation	OAC 5160:1-3-05.3	OMM Chapter 9