# MILLER TRUSTS

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A great deal of credit for the implementation of the Miller trust and in turn this article must go to the Staff of the Texas Department of Human Services. Mr. Elmo Johnson, Esq., Mr. John Stockton, and Mr. Buckey Olive have indulged this author with their time and patience during the drafting of Miller trusts.

At the end of this Speech is the latest form of the Miller trust that has been approved by the Texas Department of Human Services.

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## I. INTRODUCTION

To fully appreciate the concept of a Miller Trust, the circumstances that created the need for the device must be fully understood in advance. Once the need that the "trust" was designed to satisfy is fully within grasp, then the legal reasoning, and the steps that must be taken to utilize the trust as a device to fulfill that need is understood, its application should be easy for the advocate.

## II. WHAT IS AN INCOME CAP STATE?

The need that the trust tries to fulfill is to allow the client to qualify for Medicaid Long-term Care Benefits for nursing home care. Every state that participates in the federal Medicaid program must provide Medicaid coverage to certain individuals that are referred to as categorically needy. The criteria for the categorically needy evolves from the eligibility requirements of the Supplemental Security Income (SSI) program. SSI is Title XVI of the Social Security Act and is found at 42 U.S.C. §1382 to §1383c. These individuals; the aged, blind and disabled with incomes below a certain level, currently $446.00 per month qualify for Medicaid in all states except what are called 209(b) states. Medicaid is Title XIX of the Social Security Act and is found at 42 U. S. C. §1396 to §1396u. In all states other than 209(b) states, anyone receiving Supplemental Security Income benefits under Title XVI of the Social Security Act Sec. must be provided with medical assistance, both in the community and in nursing facilities. 42 U. S. C. §1396a (a) 10 (A). The Medicaid programs of all of the states however, do not use the same criteria for determining eligibility for benefits for these services. The programs fall into four different types in the manner in which they qualify applicants for long-term care benefits.

1) Income cap states.

2) Medically needy states.

3) Income cap states with a medically needy program that covers long-term care.

4) Income cap states with a medically needy program that does not cover long-term care.

Although all states must provide Medicaid coverage for certain groups as set forth above there are great differences in eligibility requirements between the four different types of programs. The differences between the types of programs means that an elderly person seeking to qualify for Medicaid nursing home benefits may be ineligible for any help in one state and eligible for benefits in another.

209 (b) States

Thirteen States have taken advantage of an option granted under §209 (b) of the Social Security Amendments of 1972 to base Medicaid eligibility on more restrictive criteria than those used for Supplemental Security Income.[1] Hence, these states are called 209 (b) states. These states may use more restrictive definitions for disability or blindness and may also use more restrictive financial eligibility standards than those used to determine eligibility for SSI benefits. However, any state using more restrictive financial standards than those used for SSI must allow a person who would otherwise be eligible except for their income to "spend down" their excess income to qualify for benefits. The term "spend down" means that if a person's income is higher than the amount that would allow them to qualify for the program the individual is allowed to pay toward their care the "excess" and once that money is spent on care they will be granted eligibility and the state will pay the remaining cost of their care. The 209 (b) states cannot use more restrictive financial standards for determining eligibility than were in effect on January 1, 1972.

300%er States and Income cap states

There are other programs besides the mandatory categorically eligible programs and the 209 (b) plans that are of great interest to anyone needing long term care benefits. States are allowed to cover individuals under what are called optional programs.

States that do not have a medically needy program may elect to cover institutionalized individuals whose income does not exceed 300% of the Supplemental Security Income benefit rate. §1903(f)(4)(C). States that have made the election to cover such individuals who are otherwise resource eligible are known as **income cap states**.[2]

Another option the **medically needy program** allows states to provide coverage to individuals who have more income and/or resources than otherwise permitted for mandatory or optional Medicaid eligibility. §902(a) (10) (C).

Thirty-seven states have a medically needy program.[3] Texas has a very limited medically needed program that covers elder Texans with a dependant minor child in the household.[4] However a state that has adopted a medically needy program must be further categorized according to whether the state's program provides nursing facility services to the medically needy. In states having a medically needy program for nursing home care, a person's medical and nursing home expenses are deducted from countable income until that person is below the medically needy income level.[5] States using a medically needy program may use financial criteria more or less restrictive than the SSI program but even in states using a more restrictive criteria the program is more generous than in an income cap state. The income standard for medically needy states varies greatly from state to state, but, because of the spend down feature individuals in those states will most likely qualify if the expenses of their care exceed their countable income.

Both Texas and Maryland have medically needy programs and income caps. In Maryland a person with income over the applicable income standard and nursing home expenses that exceed their income will probably qualify for nursing home benefits. Each month that person will spend down their excess income above the cap and be covered under Maryland's medically needy program. **In Texas this person will not qualify for any help from the state. The Texas medically needy program does not cover nursing home care.** Therefore, in Texas and seven other states there is no spend down for nursing home care.[6]

The income cap in Texas is currently $1,338.00 a month. **This means if your income is $1.00 above the cap you cannot qualify for nursing home assistance in Texas.**

The tragic effects of the Income Cap on Elderly Texans

This author has reflected many times on the injustice of the basic premise underlying the income cap and the tragic consequences to the elderly citizens of our state. A client in a long term care facility will face paying a monthly bill for their care exclusive of medications of approximately $2,000.00 per month. If the person has income of less than $1338.00 a month say, $700.00 per month then they cannot afford to pay a monthly bill of $2,000.00 per month unless the person has savings upon which to draw. That person, once their savings is spent down below the applicable resource limit of $2,000.00, will be eligible for Medicaid assistance. In reality after a deduction of a $30.00 personal needs allowance all of the individual's remaining income must be paid to the nursing home and Medicaid will pay the remaining portion of the bill including the person's medication bill.

If the person has income above the cap, however, say income of $1,339.00 per month the person will never be eligible for Medicaid benefits for long term care. It appears to the logical mind that an elderly person ill and infirmed and in need of 24 hr. nursing home care cannot afford to pay $2,000.00 per month if their income is $1,339.00 per month any more than the person with $700.00 per month income. The hopelessness and despair of the situation is of no bearing on the problem. The problem of too much income to qualify for Medicaid and too little income to pay the monthly tab at the nursing home is known as the "Utah Gap".[7]

**A. Effect on Single Elderly Persons**

An elderly Texan who is single faces a very difficult situation if caught in the Utah Gap. First, all of the persons savings will be spent to bridge the gap and all of their personal possessions and other items of value will be sold to produce additional funds to pay the monthly nursing home bill. Once all possible sources of funds have been exhausted, these individuals will be forced to rely on the largess of their relatives; in most cases their children which brings about the worst possible scenario for these elderly persons. One of the most important desires or wishes that this author has encountered in the practice of Elderlaw is the desire by most elderly persons to never become a burden upon their families. Many times the children cannot afford to pay the money needed to keep their parent(s) in the nursing home and are force to bring them home. These instances are commonplace in Texas and result in many adverse consequences to the elderly person both to their physical and psychological well-being.

### B. Effect on Elderly Married Persons

Many times the elderly person in need of nursing home care is married and their spouse may be in good health and still active. The Utah Gap can have very tragic consequences in these cases as well. In a typical case the husband or wife will be ill and the other spouse will be in relatively good health. The income of the ill spouse will be made up of Social Security benefits and some type of retirement income. Together, these sources of income push their income above the cap. Medicaid uses something called the "name on the check" rule to determine the income of each spouse of a married couple. Most attorneys familiar with our state's community property laws will already be saying to themselves that the name on a instrument does not truly characterize the item as community or separate property. This is true except Medicaid eligibility rules pay no heed to state marital property laws. In most instances the pension check that the husband or wife receives will clearly be community property and the other spouse clearly has a claim upon the source if the couple where to later divorce. But that has no bearing on the eligibility of the ill spouse. The applicant will be denied eligibility and in order to cover the monthly nursing home bill the assets of the couple will be slowly liquidated. Now during this slow liquidation of the couples' assets the healthy spouse must be concerned about how to pay the monthly expenses they face in maintaining a household for themselves. It is important for the advocate to keep in mind, the advanced age of the healthy spouse. With all probability they will not be in perfect health themselves, add to this situation the trauma of having to put their spouse and lifelong companion in a nursing home and the results can be devastating to the healthy spouse.

The terrible impact this forced impoverishment can have on the community spouse has been recognized by the Congress in other situations such that in 1988, Pub. L No. 100-360, 102 Stat.683 42 U.S.C. §1396r-5 was passed containing specific remedies to the problem of "spousal impoverishment". Although the remedies Congress intended were specifically to prevent the aforementioned problem they are of no use in this instance because all of the remedies apply only after the ill spouse is declared eligible for Medicaid benefits.

In particular, one of the most important provisions of the spousal impoverishment law as it is commonly known allows for a diversion of income from the ill spouse to the community spouse. 42 U.S.C. §1396r-5 (d) Instead of the monthly income being paid to the nursing home it is "diverted" to the community spouse. The amount of income that can be diverted changes every January and the current figure is $1,816.00. In situations where the ill spouse has income of $1.00 above the cap the saving provisions of the spousal impoverishment law are not available as they only apply after the applicant is declared eligible.

Prior to the Miller Trust solution to the income cap problem about the only advice that could be given to a client facing this problem was to sell their possessions and move to another state with a medically needy program.

### C. Effect on Guardianship Cases and Problems Faced by The Guardian

Many times a individual in a nursing home will be incapacitated and there is no family or friends to care for the person. In these situations the county will be forced to pursue guardianship proceedings so that the person can be cared for. If the person has income above the cap it can create a very difficult situation for the appointed guardian. The guardian is responsible for the ward's well-being and must place the ward in a safe and secure facility and be sure the ward is receiving the proper care and treatment that they need. If the income of the ward is $1.00 over the cap then the guardian is forced to find a facility to accept the ward for a payment of $1,339.00 per month when the average cost of such care is about $2,000.00 per month. (The state has set the average cost in Texas at approximately $1,883.00 per month but this author's experience shows in most areas $2,000.00 per month is more the norm.) It takes little imagination for most

of us to foresee the problems that a guardian will encounter in such a scenario. The same problem is faced by the family members of individuals similar to the ones mentioned above. It is not practical for the guardian to take the ill person home and provide the care in the guardian's home as many family members are forced to do.

Another egregious part of the Medicaid rules prevent the applicant from taking any steps to reduce his or her income by whatever means might be available. If the applicant was the recipient of a pension from a plan that was not covered by ERISA then the applicant could ask the plan administrator to stop sending the checks or to simply lower the payment. This would have the effect of lowering the person's monthly income so that they would fall below the cap and qualify for benefits. These types of steps are not allowed under the rules of the Medicaid program.

As a requirement of receiving long term care benefits the applicant is required to apply for veteran's benefits at the time they are applying for medicaid. In many cases a small monthly check from the VA will push the applicant over the cap and cause catastrophic results.

Another irony of the rules is that the Medicaid program uses the gross income of the applicant to determine if they are over the cap. If the person is a Medicare recipient then the premium for Part B of the Medicare program is taken out of their Social Security check before they receive it. The Medicare part B premium is currently $41.10 a month. If the person receives a pension check that has a deduction for a medicare supplement (Medigap Policy) then it is highly likely that the net amount that the person actually receives each month will be below the cap.

## III. What is a Miller Trust?

The dire consequences of the income cap challenged elderlaw advocates across the United

> In no event shall such amounts paid or applied each month for Beneficiary's basic living needs, from her income, the corpus of the trust, or any other source combined therewith, exceed the sum computed by subtracting twenty dollars ($20.00) from the

States to devise a solution to this problem, and in the state of Colorado the legal theory for such a solution was developed. As stated above, the rules prevent a person from taking any steps to reduce their income below the cap in order to qualify for Medicaid benefits. The legal theory involved the creation of a trust and the involuntary diversion of the person's income to such a trust. The medicaid rules state that a person cannot take steps to reduce income, but if their income was reduced, and they had no choice in the matter, then they had not voluntarily reduced income to obtain benefits. The legal theory was based on three factors:

a. the desperate need of the beneficiary,

b. the incapacitation of the beneficiary, and

c. the duty of the court to protect the incapacitated.

In a protective proceeding a guardian would petition the probate court for protective orders transferring all of the incapacitated person's income to a trust. The trust would be created by the court using its equitable powers and under the responsibility of the court to protect the welfare of the incapacitated ward. The legal theory behind such a trust was tested in Miller v. Ibarra, 746 F. Supp. 19 (D.Colo. 1990).

The Miller case was brought on behalf of four aged and mentally incompetent women. They sought to reverse a decision of the Colorado Department of Social Services that had denied Medicaid benefits to the women because their income exceeded the Colorado income cap. The income of the women had been placed in trust by the Probate Court and the access to the money restricted by the order of the Court.

Colorado has a statute based on §2-308 of the Uniform Guardianship and Protective Proceedings Act that allows the court to establish a trust to meet the foreseeable needs of a protected person without appointing a conservator if a proper basis exists. The Court had created trusts for each of the four women and specifically ordered the trustees:

> monthly income eligibility standard currently in use by Medicaid.

The Probate Court, using its equitable powers, had established the trust. It was clear that the wards had not established the trust themselves, and in fact the legal argument was available that since they were incapacitated they

did not possess the legal capacity to consent to such action. Further the Court had rendered the sums in the trust "unavailable" to the wards except for an amount $20.00 less than the cap.

The Miller Court held that under 42 U.S.C. §1396a (a) (17) (B) only "available" income may be considered in determining eligibility. The Court found the women's income in the trust was not "available" because the court that created the trusts had removed all vested property interests the women had in their incomes and placed it in the trustee.

After the Miller decision the U.S. Health Care Financing Administration (HCFA) in a letter dated April 19, 1991 from Gary Wilks, the Acting Associate Regional Administrator, Division of Medicaid to Irene Ibarra, Executive Director, Colorado Department of Social Services (a copy is attached as Exhibit "A") stated that federal financial participation would be available for Medicaid benefits to beneficiaries of similar trusts if the trust is structured in such a way as the income never reaches the individual and the beneficiary has no access to the funds before they go into the trusts.

An additional issue that was part of the controversy concerning the trust was whether or not the trust was a Medicaid Qualifying Trust (MQT) under 42 U.S.C. §1396a (k). HCFA took the position that such trusts were MQT's but that did not preclude medicaid eligibility as long as the trusts passed the tests for resources deemed available to the applicant.

Prior to the OBRA 1993 legislation the court-created trust was the most viable method for trying to qualify a Medicaid applicant with income above the states respective income cap. A key element in the strategy is a provision in the state's guardianship statute which allows the court to

The particular section of the law that is relevant is SSA 1917 or 42 U.S.C. §1396p(d)(4). A copy of the section is reproduced as Exhibit "B". This section in a nutshell creates exemptions from the new asset transfer restrictions and new provisions concerning the availability of assets contained in trusts created by OBRA '93. These exemptions are granted to three particular kinds of trusts that are very important to the Elderlaw advocate. The trusts include what are known as Supplemental needs trusts, (42 U.S.C. §1396p(d)(4)(A) Pooled Asset trusts 42 U.S.C. §1396p(d)(4)(C) and the all important Miller trust(42 U.S.C. §1396p(d)(4)(C). The Miller type trusts have also become known as Qualified Income Trusts or "QUIT's"[9] additionally, since the exemptions are all contained in this section of the law many times these trusts will simply be referred

create such a trust for the benefit of the ward. As has been previously stated, the Uniform Guardianship and Protective Proceedings Act contains a provision at §2-308 that authorizes such a proceeding. At present the Texas Guardianship Code does not specifically authorize the creation of such a trust with the provisions necessary to satisfy the requirements of the HCFA letter. In the past at least one probate court has ordered the funds of a ward to be directed to a trust created by someone other than the Court and restricted the use of the funds by the trustee so that the trust complied with the requirements set forth by HCFA.

## IV. CODIFICATION OF MILLER

On August 10, 1993 President Clinton signed into law the Omnibus Budget Reconciliation Act of 1993 (Pub.L.No. 103-66 hereinafter referred to as OBRA '93). Part II of the Act (OBRA '93, §13611 and §13612) is entitled "Eligibility" and made sweeping changes in the rules concerning the Medicaid Program (Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq.)The changes revamped the rules for Medicaid eligibility and the treatment of asset transfers by applicants for long term care benefits, as well as the rules concerning the availability of trust assets to applicants and provisions whereby the states may utilize liens as a method to recover from the estates of recipients.[8] The relative pros and cons of the changes brought about by OBRA '93 are not considered herein, but the provisions relating to an impacting the use of Miller trusts will be detailed and provided.

to as "(d) (4)" trusts.

Subsequent to the passage of the bill most Elderlaw advocates were of the opinion that Congress had codified the Miller case. This action approved its use as a method for allowing persons facing the Utah gap to finally have a bridge that would be accepted in all the states. This opinion was later substantiated by conversations with staff members of Representative Craig Washington, a member of the Committee on Energy and Commerce, Health and the Environment Subcommittee Chaired by Congressman Waxman. **Because of conversations with those close to the pulse of the legislative drafting, it is the opinion of this author that the Miller case is exactly what Congress had in mind when**

**this section was put in the law.** Immediately after OBRA '93 was signed into law, Elderlaw advocates across the country began to draft trusts modeled after the original Miller case trust. At that time HCFA had not offered any opinion concerning these trusts or offered any interpretation of the Miller trust provisions of OBRA '93. Advocates in Oregon were some of the first to have success.[10] Elderlaw advocates and representatives from the State of Oregon met and worked out a "form" trust that would be accepted by the State Medicaid authorities and allow the beneficiary of such a trust to qualify for Medicaid. At about the same time, approximately October of 1993, Elderlaw advocates were having trusts they had prepared for Florida residents rejected by that state.

As set forth above the OBRA '93 provisions relating to the Miller trusts are attached as Exhibit "B". The actual provisions of the statute consists of only 3 paragraphs. The requirements for the trust stipulate that it only be composed of: pension, social security and other income to the individual, and accumulated income to the trust. The law does not mandate who may establish the trust. At the death of the individual the remainder of the trust must be used to reimburse the State for any medical assistance paid on behalf of the individual by Medicaid after October 1, 1993. The remaining paragraph refers to another section of the law that describes the type of medical assistance program the state has, such as an "income cap" program. The last paragraph does not contain any language relevant to the trust itself.

## V. ADMINISTRATION OF THE MILLER TRUST IN TEXAS

### A. Interim Rules

Shortly after the passage of the OBRA '93 a draft of a Miller trust was informally submitted to staff members of the Texas Department of Human Services (DHS). This draft was based on the actual trusts that were being used in Colorado prior to the passage of OBRA '93. It was submitted informally, meaning that it was not submitted in conjunction with an actual application for benefits. Several months had elapsed since the effective date of the legislation authorizing the use of these trust and there had been no "official" policy memorandums or statements from the Texas DHS or HCFA. This author was in close contact with the staff of the DHS during the time and had extensive phone conversations concerning the provisions of the trust and the administration of the trust. The DHS was attempting to obtain guidance from HCFA as to how the trusts were to be treated. On January 11, 1994 a memorandum was sent out concerning the Interim Policy for Trust Exceptions Under OBRA 1993 from the Director of Long Term Care (LTC) policy for the Texas DHS. A copy of that memorandum is reproduced as Exhibit "C". These were to be the rules as to how the trusts were to be treated in Texas at this time.

On January 28, 1994 an application for Medicaid benefits for an individual with income above the cap was submitted to the DHS, accompanying the application was a Miller trust. The application and the trust were approved in March of 1994. A copy of the memorandum approving the trust is attached as Exhibit "D".

It is important to examine the treatment of these trusts by the state of Texas at this time so that later changes in the treatment of these trusts can be fully understood. Because of the length of the instrument, reproduction of the form of the Miller trust that was approved is not possible. In reality it would not be of much assistance to the advocate seeking to draft such a trust; at least in today's environment anyway.

The form of Miller trust that was approved in Texas under the interim rules was a "classic" Miller trust. As set forth above in the discussion of the Miller case this trust restricted the access of the beneficiary to the principal or income of the trust completely. The beneficiary could not compel the trustee to disburse any funds at all from the trust. Once the funds were in the trust, they would then no longer be an available resource to the beneficiary, and therefore, not be considered and asset of the applicant for eligibility purposes. The trustee was granted limited discretion to make disbursements from the trust for the benefit of the beneficiary, but the terms limited any disbursements to one dollar less than the then prevailing income cap in effect in Texas at that time. Finally, upon the death of the beneficiary any funds remaining in the trust upon the death of the beneficiary were to go to the State of Texas to reimburse the State for the cost of care provided to the beneficiary during his or her lifetime. The trust required the

trustee to maintain assets in the trust sufficient to pay administrative expenses, and within the cap constraint, the trustee could then disburse the remaining funds to providers of care for the beneficiary.

At this point it is important to take notice of a provision of the Social Security Act that affects the income of most, if not all, Miller trust beneficiaries. Most applicants that are over the income cap will have more than one source of income, but practically all applicants will receive Social Security benefits. Attached as Exhibit "E" is a copy of section 02402.060 of the Program Operations Manual System (POMS) that shows how the Social Security Administration views the deposit of Social Security benefits into trust accounts for recipients. It is very clear that deposit of the beneficiary's check into the trust account does not constitute an assignment of the person's benefits. This inability to assign Social Security benefits to any third party is an interesting footnote to keep in mind when reviewing Exhibit "D", the letter approving the first Miller trust. Query why the memo requires that the funds be direct deposited into the trust account if that cannot be an assignment of the funds?

The terms of the first trust were in compliance with the OBRA '93 requirements and followed the principals laid down by Miller. The beneficiary could not compel the use of the funds and the amount that could be disbursed was limited to one dollar below the cap. As set forth in the interim rules, the transfer of the income stream (social security) to the trust was not considered a transfer of assets for which the applicant would receive a penalty. It appeared that after seven months of drafting and redrafting that a workable form of a Miller trust was a reality. Texas citizens were now on an equal footing with the citizens of Colorado, Oregon, and the other states that had approved the use of the Miller trust. This would be a great place to include a summary and go home but the saga doesn't end here.

## VI. HCFA MEMORANDUM

Attached as Exhibit "F" is a copy of a HCFA memorandum dated March 17, 1994. This memo attempts to outline how HCFA intends to treat Miller trusts and how they will affect the eligibility of a beneficiary of a trust. The memo outlines various problems with the OBRA '93 language and the failure of OBRA '93 to exempt the Miller trust from the application of SSI rules and other laws that affect it efficacy. The end result in spite of all of the problems that HCFA finds with the legislation is that they are going to bow to the will of Congress, "the clear intent of this exemption was to help individuals living in so-called "cap" States". The solution that HCFA comes up with, however, leaves a lot to be desired. The answer produces lots of questions. The memo seems to require all funds deposited into the trust to be paid out for the person's care each month. This creates a problem. How do you pay the administration costs of the trust, such as checking account fees? As set forth above, how do you divert income to a spouse under the Spousal Impoverishment Act if all the funds must go toward the persons care? The memo says "all the funds deposited into the trust are paid out each month;" This phrase seems to go against the idea of limiting the income of the individual to an amount below the cap. The idea that funds would remain in the trust was clearly in Congress's intent when they drafted the law. Why else would they have required that sums remaining in the trust at the death of the person be paid to the state? In short, the memo produced as much confusion and questions as it sought to alleviate.

At the time of the printing of this paper the Texas DHS has requested a clarification of the HCFA memo. The DHS at this time is continuing to operate under the interim rules that they put out in the January 11, 1994 memo. (Exhibit "C") Pending the response from HCFA, there is little guidance available to an advocate wishing to draft such a trust for someone seeking eligibility for benefits. The HCFA memo makes it very clear that study of the original Miller case is of no help as the philosophy of restricting the income of the individual by preventing disbursement of amounts in excess of the cap is no longer the correct methodology. Further, it appears from the memo that complying with the OBRA '93 law is not enough to assure the approval of the trust, because the HCFA memo ignores the plain language of the law that allows funds to be accumulated in the trust as long as they ultimately are paid to the state.

Although there are many things that we still do not know about the drafting of a Miller trust there are some things that are clear. Drafting a trust so that it complies with the OBRA '93 law will not work. Drafting a trust that complies with the language of the original Miller case, (the model for the law) will not work. Drafting a trust that complies with the Interim Rules established by the State of Texas DHS will not work. Sufficiently

armed with some knowledge of what will not work, the advocate is faced with a difficult task in drafting a workable, acceptable Miller trust. As time for the submission of this paper approached the fifth revision of the original trust approved under the DHS's interim policy was under review by the DHS. It is the hope of this author that a workable draft will be approved by the date of the institute.

## Bibliography

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Olsen and Wiesner, "The Challanges of Working with the "Income Cap", 1992 NAELA Symposium Manual, Section #20

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## Endnotes

TRUST DECLARATION
OF

(ELDER)

This declaration of trust is made this ____ day of ___________, 1996, by (PERSON) (hereinafter referred to as the settlor), regarding the estate of (ELDER) (hereinafter referred to as the beneficiary).

The Trust Purpose

The beneficiary of this trust requires continuing medical and nursing supervision and is completely dependent upon others for (HIS,HER) personal care. Beneficiary also needs assistance to care for and manage (HIS,HER) financial situation.

The overriding purpose of this trust is to obtain the necessary care from whatever sources might be available for the beneficiary. To that end this trust is designed to restrict the countable income of the beneficiary so that the beneficiary will meet the income requirements for Medicaid eligibility in the State of Texas.

It is the intention of the settlor of this trust to create a trust that will comply with the provisions of 42 USC §1396p, (b) et seq as amended by The Omnibus Budget Reconciliation Act of 1993 (effective August 11, 1993). Specifically to comply with (d) (4) (B) which states in part:

(B) A trust established in a State for the benefit of an individual if:

1. The trust is composed only of pension, social security and other income to the individual (and accumulated income in the trust); and
2. The State will receive all amounts remaining in the trust on the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.

It is further the intention of the settlor to make any income of the beneficiary that exceeds the "income cap" as established in the State of Texas an unavailable asset to the beneficiary such that the beneficiary's countable income as defined by the eligibility rules of the Texas Medicaid Program will at all times be less than the prevailing income cap.

ARTICLE I

NAME OF TRUST

This trust shall be known as the (ELDER) INCOME TRUST.

ARTICLE II

BENEFICIARY

(ELDER) and the Texas Department of Human Services shall be the sole beneficiaries of the trust. Beneficiary (ELDER) is a (WIDOW) born on (BIRTH MONTH, DAY, YEAR). (HE,SHE) presently resides at (STREET ADDRESS), in (CITY, STATE).

ARTICLE III

IRREVOCABLE

This trust shall be irrevocable.

ARTICLE IV

APPOINTMENT OF TRUSTEE

Settlor hereby appoints (TRUSTEE NAME) as the Independent Trustee of this trust. Trustee shall serve without bond or supervision of any court.

ARTICLE V

TRUST ESTATE

Settlor hereby grants and assigns to the Trustee the monthly income of (ELDER) described in "Schedule A," attached hereto and incorporated herein by reference. Notwithstanding the named items shown on "Schedule A" no other assets shall ever be included in this trust or added to this trust other than those items allowed under OBRA 1993. The Trustee acknowledges receipt, in trust, of said property. No property other than the beneficiary's monthly income shall be used to fund this trust. Such property is to be held, administered and distributed according to the terms of this instrument.

ARTICLE VI

DISPOSITION OF INCOME AND PRINCIPAL

Section 1. Distribution of Principal and Income While (ELDER) Receives Medical Assistance.

a. Approved Payments from the trust. The purpose of this trust is to enable the

beneficiary to qualify for Medicaid assistance. In the administration of the trust, trustee shall do all acts necessary to establish and maintain the beneficiary's eligibility for Medicaid assistance. The trustee is specifically authorized to make any disbursements of income or principal of the trust for whatever purposes are deemed in the trustee's discretion necessary to fulfill the purpose for which the trust is created. The trustee is specifically prohibited from making any disbursements that would disqualify the beneficiary from receiving benefits under the Medicaid program. The trustee shall observe the rules and regulations concerning monthly income eligibility standards currently in use by the Medicaid program administered by the State of Texas or any other state in which the beneficiary may reside, to determine eligibility for Medicaid benefits otherwise referred to as the "income cap". The powers granted in this paragraph to the trustee concerning disbursement of income or principal from the trust are considered to include the authority to make whatever disbursements or to withhold from disbursement any amounts necessary to allow the trust to qualify the beneficiary for Medicaid benefits under the rules and regulations currently promigated or to be promigated by the Health Care Financing Administration and the State of Texas Department of Human Services. The Trustee shall first disburse the monthly personal needs allowance to the beneficiary, then must pay minimum monthly maintenance needs allowance, and then from funds remaining, the cost of medical assistance provided to the beneficiary. The Trustee may make distributions for the payment of the beneficiary's medical expenses to the beneficiary's guardian, conservator, caretaker, attorney, or by direct payment of the medical expenses for the beneficiary. The Trustee is ordered to make all distributions from the trust by the last day of the month in which the funds are deposited in the trust.

b. Approved Deductions From Distributions. Deductions may be taken from the trust distribution to the same extent that deductions from the income of a nursing home resident who is not a trust beneficiary are allowed under the Texas medical assistance program.

Section 2. Distribution of Principal and Income if (ELDER) Ceases to Receive Medicaid. In the event that (ELDER) ceases to receive benefits under the medical assistance program, the entire income and corpus of the trust may be utilized by the Trustee for expenses relating to the care of (ELDER) including but not limited to nursing home care, medical care, health, maintenance and welfare. Any distributions under this section shall be at the sole discretion of the Trustee.

ARTICLE VII

TERMINATION OF TRUST

Section 1. Events of Termination. This Trust shall terminate upon the beneficiary's death.

Section 2. Distribution Upon Termination.

a. Distribution Upon Termination Due to Death While (ELDER) Receives Medical Assistance. When termination of the trust occurs because (ELDER) dies while receiving benefits under the Texas Medical Assistance Program, the Trustee shall then distribute and deliver any remaining corpus or rights to property in trust belonging solely to beneficiary up to an amount equal to the total medical assistance paid on behalf of the individual by the Texas Medical Assistance Program to the Texas Department of Human Services or its successor agency as reimbursement to the Texas Medicaid program for the Medicaid benefits and other Medicaid assistance provided to the beneficiary during (HIS,HER) lifetime. All trust property remaining thereafter shall be distributed to the named beneficiaries of the last will and testament of (ELDER) or (HIS,HER) heirs at law.

b. Distribution Upon Termination Due to Death After Cessation of Medical Assistance. In the event that (ELDER) no longer receives benefits under the Texas Medical Assistance Program, the Trustee shall distribute to the Texas Department of Human Services or its successor agency at the time of the beneficiary's death an amount equal to the total medical assistance paid on behalf of the individual by the Texas Medical Assistance Program to the Texas Department of Human Services as reimbursement to the Texas Medicaid Program for benefits provided by the Texas Medical Assistance Program to (HIM,HER) during (HIS,HER) lifetime. All trust property thereafter received by the Trustee, which is not distributed during the lifetime of (ELDER) pursuant to the preceding Article VI Sec. 2 shall be distributed upon the death of (ELDER) to the named beneficiaries of the last will and testament of (ELDER) or (HIS,HER) heirs at law.

ARTICLE VIII

TRUST ADMINISTRATIVE AND PROTECTIVE PROVISIONS

Section 1. Jurisdiction. This trust shall be administered expeditiously and consistently with its terms, free of any judicial intervention and without order, approval or other action by a court, subject only to the jurisdiction of a court which is invoked by the trustee or other interested parties or as otherwise provided by law.

Section 2. Modification or Termination by Court During the Lifetime of the Primary Beneficiary.

This trust may be subject to modification or termination by a Texas court. If the laws governing the benefit programs that this trust seeks to qualify the beneficiary for change such that the intentions of the settlor were no longer obtainable under the terms of this trust as created, then the Trustee, beneficiary or any interested person is authorized to seek modification or termination of the trust so that the purposes of the settlor would be realized. The Trustee is specifically authorized to amend the trust at his discretion without resorting to any involvement of a court if such an amendment is necessary to cause the trust to comply with a policy, rule or regulation of the benefits program for which the beneficiary seeks qualification.

Section 3. Trust Property Not Subject to Probate. Any property payable to this trust or contained in this trust shall not be subject to claims against the estate of the beneficiary following death, nor shall such benefits be subject to the control of the personal representative of the beneficiary nor be included in the property administered as part of the probate estate of the beneficiary. Upon the death of the beneficiary the property contained in the trust shall pass as set forth herein and under no circumstances shall the property in this trust be considered to be part of the probate estate of the beneficiary.

Section 4. Inalienability. No beneficiary shall have any right to anticipate, sell, assign, mortgage, pledge or otherwise dispose of or encumber all or any part of the trust estate nor shall any part of the trust estate including income, be liable for the debts or obligations, including alimony, of any beneficiary or be subject to attachment, garnishment, execution, creditor's bill or any other legal or equitable process. The interests of the beneficiary of this trust shall be held subject to a "spendthrift trust" as set forth in Texas Property Code Section 112.035. This provision shall not bar any remedy sought by either the state or county department of social services for the purpose of obtaining trust distributions in accordance with this trust declaration and applicable federal and state laws and administrative regulations.

Section 5. Reports. Periodic reports shall not be made unless required by the regulations of the Texas Department of Human Resources. The trust records shall be open at all reasonable times to inspection by the beneficiary of the trust, the Texas Department of Human Services which approved the beneficiary's assistance case, and their properly appointed representatives.

## ARTICLE IX

## POWERS OF TRUSTEE

Section 1. Property Code Title 9 Trusts Provisions. The Trustee may perform every act reasonably necessary to administer the trust. In addition to all of those powers specifically granted in this Article, the Trustee may exercise those powers set forth in the **Texas Property Code Title 9 Trusts Secs. 101.001 through Sec. 115.017**, together with any amendments to such Code subsequent hereto,

and said Code as it exists at the date of the execution of this trust is incorporated herein by reference and made a part hereof as fully as if it were set out at length herein.

ARTICLE X

TRUSTEE SUCCESSION AND ADMINISTRATIVE PROVISIONS

Section 1. Resignation or Death of the Trustee. Any Trustee may resign by giving thirty days written notice to the beneficiary, or to the guardian, conservator or other legal representative of the beneficiary. Such resignation shall be effective 30 days from the date notice is given. In the event the Trustee resigns or dies while holding office, (ALT.TRUSTEE) shall serve as successor Trustee. If (ALT.TRUSTEE) resigns, or dies while holding office, any interested person may apply to be appointed successor trustee as set forth in Texas Property Code sec. 113.083.

Section 2. Representative of Beneficiary. The conservator of a beneficiary under legal disability or, if none, the guardian of such person or, if none, the person having the right of custody of a minor beneficiary, may act for such beneficiary for all purposes under the administrative provisions of this trust.

Section 3. Rights of Successors. Every successor Trustee shall have all the title, rights, powers, privileges and duties conferred on or imposed upon the original Trustee, without any conveyance or transfer. No successor Trustee shall be responsible for any act or omission to act on the part of any previous Trustee.

Section 4. No Bond. No Trustee, or any successor, shall be required to give any bond in any jurisdiction, and if, notwithstanding this direction, any bond is required by any law, statute or rule of court, no sureties shall be required.

ARTICLE XI

DEFINITIONS

Except as otherwise provided, definitions of terms in this trust shall be in accordance with the Texas Trust Code, as amended.

Any reference in this trust to the Texas Department of Human Services, the county department of social services, or the Texas Medical Assistance Program, shall include any successor public agency or program which becomes vested with the responsibility for providing publicly supported benefits to eligible

Texas residents.

## ARTICLE XII

## CONSTRUCTION

Section 1. Conformity with Statutes. In case of ambiguity or conflict, this trust should be construed in such a manner and shall be deemed to comply with the provisions of The Texas Property Code Title 9 Trusts, as amended.

Section 2. Applicable Law. The validity of this trust shall be determined by reference to the laws of Texas. Questions of construction and administration of this trust shall be determined by reference to the laws of Texas.

Section 3. Headings of Articles and Sections. The headings of articles and sections are included solely for convenience of reference, and shall have no significance in the interpretation of this agreement.

Section 4. Construction of Number and Gender. Unless the context requires otherwise, words denoting the singular may be construed as denoting the plural, and words of the plural may be construed as denoting the singular, and words of one gender may be construed as denoting such other gender as is appropriate.

Signed by (PERSON) settlor herein, and by (TRUSTEE NAME), who by (T-HIS,HER) signature below accepts the office of Trustee on the date indicated on page 1.

__________________________________
(PERSON), SETTLOR

__________________________________
TRUSTEE OF THE (ELDER) TRUST

**EXHIBIT "A"**

**PROPERTY OF THE (ELDER) TRUST**
**(GROSS AMOUNT)**

| | |
|---|---|
| Social Security | $__________ |
| Other: _______________ | $__________ |
| TOTAL | $__________ |

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1. Connecticut, Hawaii, Illinois, Indiana, Minnesota, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, and Virginia.

2. Alabama, Alaska, Arizona, Colorado, Delaware, Idaho, Mississippi, Nevada, New Mexico, Ohio, South Dakota, Wyoming.

3. Arkansas, California, Connecticut, D.C., Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New York, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin.

4. Heike, John, Medicaid Basics, Elder Law Institute (SBOT Sept. 1992) at page G-2.

5. Olsen and Wiesner, The Challenges of Working With The "Income Cap" page 14. In a presentation delivered at The National Academy of Elder Law Attorneys, Inc, Fourth Elder Law Institute, San Francisco, California, April 29, 1992.

6. Arkansas, Florida, Iowa, Louisiana, New Jersey, Oklahoma, Oregon, Texas.

7. The term "Utah Gap" was coined by Virginia Fraser, Colorado's Nursing Home Ombudsman of The Legal

Center in Denver, Colorado. She likened the position of these individuals to a gap in the Utah canyon lands with no way out.

8. Wiesner, Ira, Asset Transfers, Availability and Estate Recovery Under OBRA '93 Statutory Analysis In Context, page 13. In a presentation delivered at The National Academy of Elder Law Attorneys, Inc, Third Elder Law Institute, St. Louis, Missouri, November 19, 1993.

9. The Qualified Income Trust or "QUIT" acronym was first used to described this type of trust by Ira Wiesner, Esq., in his presentation delivered at The National Academy of Elder Law Attorneys, Inc., Third Elder Law Institute, St. Louis, Missouri, November 19, 1993. The overall acceptance of the moniker by the Elder Law Community is still subject to some debate, the term Miller trusts appears to be the more widely used name.

10. Conversation with Cynthia Barrett, Esq., 411 Commonwealth Building, 421 S.W. Sixth Ave., Portland, Oregon 97204, held at The National Academy of Elder Law Attorneys, Inc., Third Elder Law Institute, St. Louis, Missouri, November 19, 1993.