

## OBRA '93 Changes in Medicaid Transfer of Asset Rules

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Medicaid is the government program that pays for, among other things, long-term care for the elderly and the disabled. For millions of people who are disabled and poor, Medicaid pays for acute health care, dental care, respite services, rehabilitation therapies, assistive technology devices and other community-based services and supports.

OBRA '93, which President Bill Clinton signed into law on August 10, 1993, renders significant changes to the eligibility rules at Part II of the legislation (all amendments are to 42 U.S.C. sec. 1396 et seq.). The new Medicaid rules were designed to restrict elderly persons from rearranging their finances in order to qualify for Medicaid to pay for their long-term nursing home care. For the most part, the new law limits the ability of elders to transfer their assets to their adult children or to trusts known as "Medicaid Qualifying Trusts" in order to qualify for Medicaid. However, there are two major exceptions to the new transfer-of asset rules that have a tremendous impact on the lives of persons with disabilities. These are positive changes and expand our ability to help persons with disabilities to preserve their assets and still qualify (or remain qualified) for Medicaid.

First, however, the bad news: OBRA '93 increased the periods after a transfer of assets during which the individual will be ineligible for Medicaid. OBRA '93 extended this so-called "look back" period from 30 months to 36 months for outright gifts. The new law also extended the "look back" period to sixty (60) months for transfers to irrevocable trusts, which eliminated largely the ability of most families to use trust arrangements to protect assets.

Another piece of bad news is that the new law eliminated a person's ability to disclaim an inheritance. If a person with a disability was in line to receive an inheritance, and if the receipt of this inheritance would jeopardize his or her eligibility for government benefits, he or she, prior to OBRA '93, could simply disclaim the inheritance. OBRA '93, however, treats disclaimers as a transfer of an asset and a person would lose his or her eligibility for Medicaid if he or she disclaims an inheritance.

Now for the good news: OBRA '93 created two exceptions to the transfer-of-asset rules [see 42 U.S.C. Sec. 1396p(d)(4).], which expanded an attorney's ability to help persons with disabilities and their families to remain qualified for Medicaid, despite having excess assets in their name.

First, a person going into a nursing home, who otherwise would not qualify for Medicaid because of the value of his or her own

assets, can qualify for Medicaid payment of his or her nursing home care by transferring assets to an irrevocable "OBRA '93" special needs trust for the benefit of a person with a disability. Unlike other transfers of assets, there is no "look back" period for these transfers. The individual with a disability who is the beneficiary of the trust must be under the age 65 and must be disabled as defined by Social Security regulations.

Second, if a person with disabilities and under age 65 has money in his or her own name (for example, because of a lawsuit settlement, direct inheritance, savings, or gift), the parent or guardian of the disabled person could create a special needs irrevocable trust and arrange for the transfer of the individual's assets to the trust. If the parents are deceased and the individual with disabilities does not have a guardian, the individual could petition the court to create an OBRA '93 special needs trust. Once the funds of the disabled person have been transferred to the trust, he or she will be immediately eligible for Medicaid. When the disabled individual dies, the state is entitled to reimbursement from an OBRA '93 trust to the extent that the state has provided Medicaid funds to that individual. If there are any assets left after the state has been reimbursed for the amount of Medicaid services that it paid, the remainder of the trust could be transferred to other family members or charities. OBRA '93 trusts are sometimes referred to as "payback" trusts because of this reimbursement requirement.

PLEASE NOTE: These trusts do not replace the need for families with a disabled individual to write an estate plan that enables a disabled family member to benefit from an inheritance and remain qualified for government benefits. Families would still need to incorporate a special needs trust into their estate plan if they have a family member with a disability. With proper planning, parents can leave the remaining trust estate to other family members when the disabled beneficiary dies. There is no "payback" requirement in a traditional special needs trust.

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