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Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts
Incapacity Planning | Guardian Advocacy | Developmental Disabilities

Medicaid Planning (A/K/A the Rules More In Depth)

I. General Planning Concepts – Exempt vs. Countable. The General idea is to convert Countable Resources into an Exempt Asset or a Non-Countable Asset.

A. Typical Exempt Assets:

1. Primary Residence (in Florida or in some other states) – **1640.0543.01** – excluded if it is principal residence, if there is a spouse at home (unlimited value) or if the APPLICANT intends to return home (equity capped at \$636,000). Houses, cooperative and condominium apartments, mobile homes, motor homes, and houseboats are examples. See DCF MEMO
2. Personal Property – Household Goods etc. up to \$2,000 – **1640.0565.01** – Does not include wedding ring and engagement ring. There is a presumption that the individual's goods are worth \$1,000 unless reported otherwise. If married, all personal property of the spouse is not counted.
3. Burial/Funeral Arrangements and Plots – **1640.0507-0517**
 - a. Irrevocable contracts are excluded and those that the seller won't liquidate or revoke.
 - b. Additional \$2,500 can be excluded if designated for burial **1640.0514** – make sure joint or POD or will lose at death to estate recovery. Can be any type of account: checking, savings, money market or CD.
4. Vehicle(s) – **1640.0591**
 - a. One vehicle of any value is excluded
 - b. A second vehicle is excluded if over 7 years old
 - c. The owner does not need to be able to drive.
5. Income Producing Property – **1640.0544-0548 see also 1840.0504**
 - a. Must produce income consistent with its value

- b. If not reasonable income then counted in full
- c. Can purchase income producing property or an interest in an income producing property
- d. See DCF memo on Land Trust. Treat real estate placed in a Land Trust as personal property and therefore not considered under this section

6. Life Estates in Real Estate - **1640.0305.03 + 1640.0551**

- a. Ownership is excluded as an asset, no value
- b. Transfers of life estates are allowed, no penalty
- c. The creation of a life estate will cause a penalty period
- d. Can't purchase a life estate in another's residence unless the Applicant lives in the home for at least a year (New with DRA)

7. Life Insurance – **1640.0554**

- a. Only counts if face value of all policies exceed \$2,500
- b. Cash value counts as an asset
- c. See DCF memo on Life Insurance (called Reversionary Annuity)

8. Non-Negotiable Assets – **1640.0316**

9. Loans and Promissory Notes – **1640.0556 to 1640.0561.03**

- a. If can't be converted to cash within 20 days, look at income producing exception
- b. In payment mode, counts as income
- c. **THIS POLICY CHANGED ON MARCH 1, 2005, SEE TRANSMITTALS NO.: P-04-10-0017 AND P-04-12-0200**

B. Transfers of Assets (the dreaded "T" word) – **1640.0600**

1. Penalty Calculations – **1640.0618**

- a. Not automatic 36 months or 60 months
- b. Based on the amount transferred
- c. One month of ineligibility for every \$9,703 transferred – **1640.0618** officially changed for all transfers no matter when made
- d. Transfer and Wait Out the Applicable Penalty. **MUST NOW BE WILLING TO WAIT OUT 5 YEAR WAIT (OR REPAIR GIFT)**
- e. Penalty does not start running until the applicant applies and is otherwise qualified. This means the applicant must be in the nursing home and within asset and income limits to START the waiting period.
- f. There is no guidance that says the applicant must stay in the nursing home during the entire penalty period.

2. Factors to Consider in Making Transfers

- a. Tax laws and Medicaid laws do coincide.
- b. Gift Tax Issues – still limited to \$16,000 per year per person or must report gift on gift tax return (form 709)
- c. Capital Gains Tax Issues – gifted assets retain original cost basis
- d. Income Tax Issues – can't gift tax deferred accounts without paying income tax first

- e. Estate Tax Issues – generally not a problem but recognize that Medicaid and estate tax planning don't mix very well
 - f. Transfer Can Be Just Adding a Name to the Asset – when is a gift completed?
 - g. Is there Capacity to Gift?
 - h. Transferring a Worthless Asset causes no penalty. Compare with Transferring an Exempt Asset.
 - i. Repairing a transfer **1640.0620** – the Recipient of a gift can give back the “uncured” portion (the amount remaining causing the penalty)
3. Allowable Transfers – **1640.0609.04**
- a. Transfers to a Spouse before **1640.0609.04** or after approval - **1640.0610**
 - b. Transfers to a Blind or Disabled Child (but then it's their asset)
 - c. Transfers by a Spouse After Approval – **1640.0641**
 - d. Transfers to Certain Trusts – 42 USC §1396p(d) – **1640.0576.08** –
 - e. Transfers of Exempt assets (other than homestead or real estate that was excluded because it was listed for sale). **1640.0609.04 11**. This could include a vehicle of any value. Question as to whether this provision allows you to Transfer a rental property without penalty.
 - f. Special Issues for Transfers of Residence **1640.0609.03** An Applicant may transfer (gift) their primary residence to the following individuals:
 - i. To a Blind, Disabled or Dependent Child Under Age 21
 - ii. To a Sibling With an Equity Interest in Home Who Resided in Home for 1 Year or More
 - iii. To a Child Who has Resided in the Home for Past 2 Years and Cared for the Applicant
4. Pitfalls of Transfers
- a. Transfers of Home (not to be confused with other exempt assets) - **1640.0609.04** – Can't transfer home, but can transfer other exempt assets except property excluded due to listing for sale
 - b. Miscalculation of Transfer Penalty – If you apply too early, you can cause a longer penalty period than just 60 months
 - c. Transfers to the Wrong Type of Trusts (Medicaid Qualifying Trusts) – **1640.0312.01 + 1640.0576.04** et. seq.
 - d. Transferred Assets are Not necessarily Protected, they're just gone
 - e. Transfers of Income Producing Asset
 - f. Establishment of Joint Tenancy Can be a Transfer
- C. Income
- 1. Transfers of Income - **1840.0111**
 - 2. Sources of Income – know which income counts and which does not and also what is deducted from gross income
 - 3. Income Trusts – **1840.0110**

D. Other Strategies

1. Support and Maintenance Agreements – **1640.0614.04** – If the Applicant will receive services in exchange for payment, there is not a transfer for less than fair value. The services must not be duplicative of services covered by Medicaid and must be provided for a period of time equal to or greater than the life expectancy of the Applicant. A log book should be kept of time spent satisfying the contract.
2. Annuities (Retirement Funds) – **1640.0505.04 + 1640.0609.02 (transfers to Retirement Funds)**
 - a. Requirements regarding making State first Beneficiary
 - b. Types of Annuities – Deferred, Immediate, Fixed and Variable
 - c. Terms of Annuity – Who is the owner? Can the owner get a lump sum payout (even with a penalty)?
 - d. Payouts (Income) From Annuity – Period of payouts – **Social Security Periodic Life Table**
 - e. Who is the Beneficiary?
 - f. True IRA's are exempted if receiving periodic distributions. If over age 70 ½ if taking required distributions then they meet the test. This applies to Applicants and Spouses. There are special rules that apply when Retirement Account was established during the “look-back” period.
 - g. Necessity to make State the Beneficiary if there are still payments coming back during the life of the annuitant or owner.
3. Establishment of Joint Tenancy – **1640.0305.02 – 1640.0307.03**
4. Promissory Notes **1640.0556 – 0561.03**
5. Increase Community Spouse Resource Allowance – Now an income first State. **1640.0314.01.**
6. Spousal Refusal – **1640.0314.01 - .03** – The Department of Children and Families does not recognize a Pre-Nuptial Agreement. If spouse refuses to make their assets available to Applicant AND Applicant assigns any rights of support to State of Florida (form CF-ES 2504) then Assets of Community Spouse are not counted. Can do transfer of assets to spouse *prior* to signing Refusal but if Transfer assets *after* Refusal signed then a Transfer subject to Penalty has occurred.
7. Hardship Cases – **1640.0314.04** - Good Luck winning your argument. Usually facilities will be more successful than family members making this argument.
8. Half a Loaf Strategy – The concept of this strategy is combining a transfer and waiting the penalty period with the ability to repair gifts (or partial gifts) **1640.0620**. We could transfer the entire amount and start a waiting period (assuming we meet all other eligibility criteria). We then give back half of the assets and cut the waiting period in half and use the returned funds to pay long term care expenses during the now diminished waiting period. Another variation would be to transfer ½ of the assets and put ½ into a Pooled Trust. The transfer would cause a waiting period, but the amount going into the Pooled Trust would not. Then we use the funds in the Pooled Trust to pay during the waiting period. The amount transferred would be protected.

Careful calculation should determine exactly how much should be gifted and how much returned (or put into Pooled Trust) so that the penalty period would completely run in the month the last “unprotected” dollar is spent.

II. Medicaid Liens, Estate Recovery and Protecting “Protected” Assets

A. Medicaid Liens - Probate Estate vs. Non-Probate Assets

1. Estate Recovery
2. Contracted With Third Party to Collect
3. Must Notify the State as a Creditor
4. State is a Class 3 Creditor (out of 8 classes)- See FLA STAT 733.707

B. Homestead

1. Vacant Home Problems – can’t rent out without risk of estate recovery (Lady Bird Deed can help)
2. Maintenance – Where will money come from to maintain the home?
3. Insurance – Ever tried to get insurance on a vacant home? (Ever tried to get insurance on *any* home?)
4. Taxes – Where will money come from to pay the real estate taxes?
5. Just because exempt for eligibility doesn’t necessarily mean it will be excluded from estate recovery (leasehold estate, non-family beneficiary, etc).

III. Trusts – **1640.0576.01 – 1640.0576.11**

A. Self-Settled Trusts

1. Under 65 Disabled Trust ((d)(4)(A)) – 42 USC 1396 p (d)(4)(A) – **1640.0576.08 See Appendix A-22.4 -**
 - a. Must be less than 65 years of age when funded.
 - b. Can be signed by parent, grandparent, legal guardian or court. Now can also be signed by the individual themselves (and therefore by a POA).
 - c. How can funds be used? For Anything.
 - d. Assets (and income) deposited into trust are exempt and the funding event is not a transfer.
 - e. Any income deposited into Trust does not count toward eligibility (in the month deposit is made).
 - f. Any distributions paid to third parties not counted as income.
 - g. Any funds remaining on death must first pay back Florida for medical benefits received.
2. Pooled Trust ((d)(4)(C))– 42 USC 1396 p (d)(4)(C) **1640.0576.08 See Appendix A-22-6.**
 - a. Can be any age (in Florida).
 - b. Need a determination of being “disabled” by DCF.
 - c. Trust is already established by a non-profit and should already be approved by DCF.
 - d. Participate in Pooled Trust by signing a Joinder Agreement.

- e. Can be signed by parent, grandparent, legal guardian, court or individual themselves (and therefore a POA).
- f. How can funds be used? For Anything.
- g. Assets (and income) deposited into trust are exempt and the funding event is not a transfer.
- h. Any income deposited into Trust does not count toward eligibility (but will be for Patient Responsibility).
- i. Any distributions paid to third parties not counted as income.
- j. Any funds remaining on death retained by the Pooled Trust or if can payback Medicaid then heirs can benefit.

Guardian Pooled Trust www.GuardianPooledTrust.com –
(800) 669-2499

- 3. Qualified Income Trust ((d)(4)(B)) – 42 USC 1396 p (d)(4)(B) – only used to handle excess income over the Income Cap of \$2,523/month. Distributions can only be made for medical expenses.
- 4. Trust for Disabled or Blind Child **1640.0609.04 6. and 7.**

B. Trusts Set up By Others

- 1. Trust by Spouse – Can only be set up in Will – **1640.0576.07 and 1640.0576.08** - Qualifying Special Needs Trust (FL STAT 732.2025(8) and 732.2045(1)(g))
- 2. Trust by any other Person – **1640.0576.03** – If Applicant does not have the ability to revoke or direct the trust only consider payments made directly to the Applicant as income. Distributions to a 3rd party are permitted.

C. Coordinating Estate Plans

- 1. For Spouse – Elective Share requirement is not currently being enforced by DCF (this will likely change).
- 2. For Transferees – Plan if the transferee dies before the Applicant, gets sued, gets divorced or has credit problems.

D. Maintaining Eligibility After Qualification

- 1. Inheritance – Income and Asset – **1840.0109.04** – income when available, asset each month thereafter
- 2. Personal Injury Settlement – Medicaid Lien
- 3. Moving to Another State – must reapply in the other state, no reciprocity
- 4. Appreciation of Assets – okay for spouse, not for Applicant. CS's assets are not reviewed after qualification
- 5. Conversion of Exempt Asset to Countable Asset – if home (either residence or rental) or vehicle is sold must deal with the proceeds. Consider gifting vehicle prior to selling.