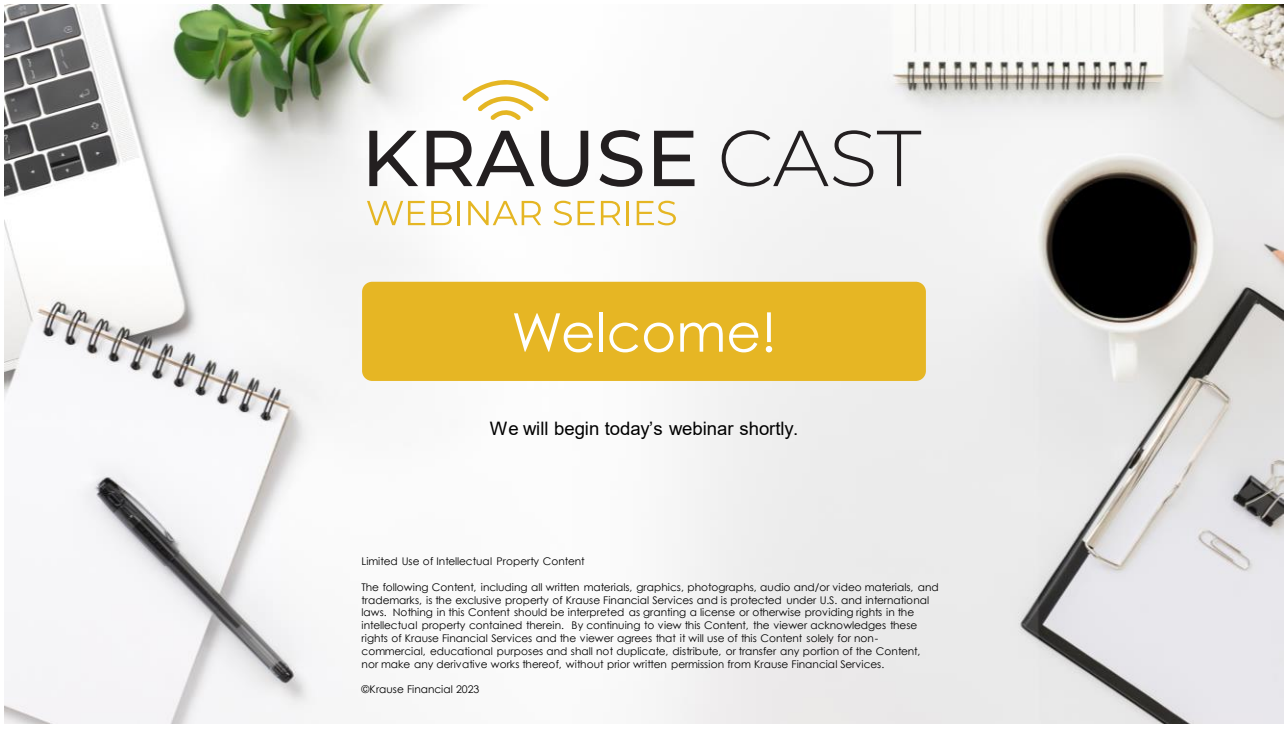
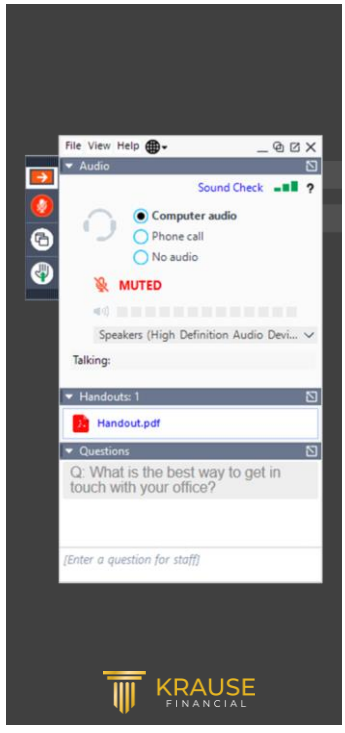



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# Questions & Handouts

Don't forget to complete the survey at the end of today's presentation!




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# UTILIZING QUALIFIED INCOME TRUSTS IN A MEDICAID CRISIS PLAN

Presented by:

**Jim Wolverton, J.D.**

*Director of Legal Content*

September 14, 2023

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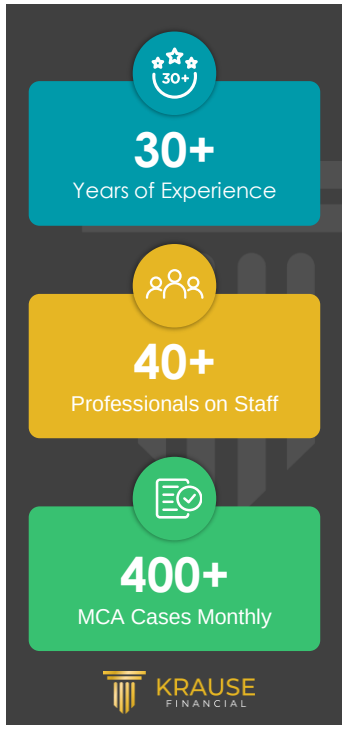
## About Us

Krause Financial is an attorney-led firm that provides asset preservation solutions for estate planning and elder law attorneys and their clients. Using our specialized insurance products, resources, and support, we help attorneys streamline the process of advising clients planning for long-term care.

**Our Mission:**

> Empower legal professionals to navigate long-term care planning with confidence.

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# Today's Goals

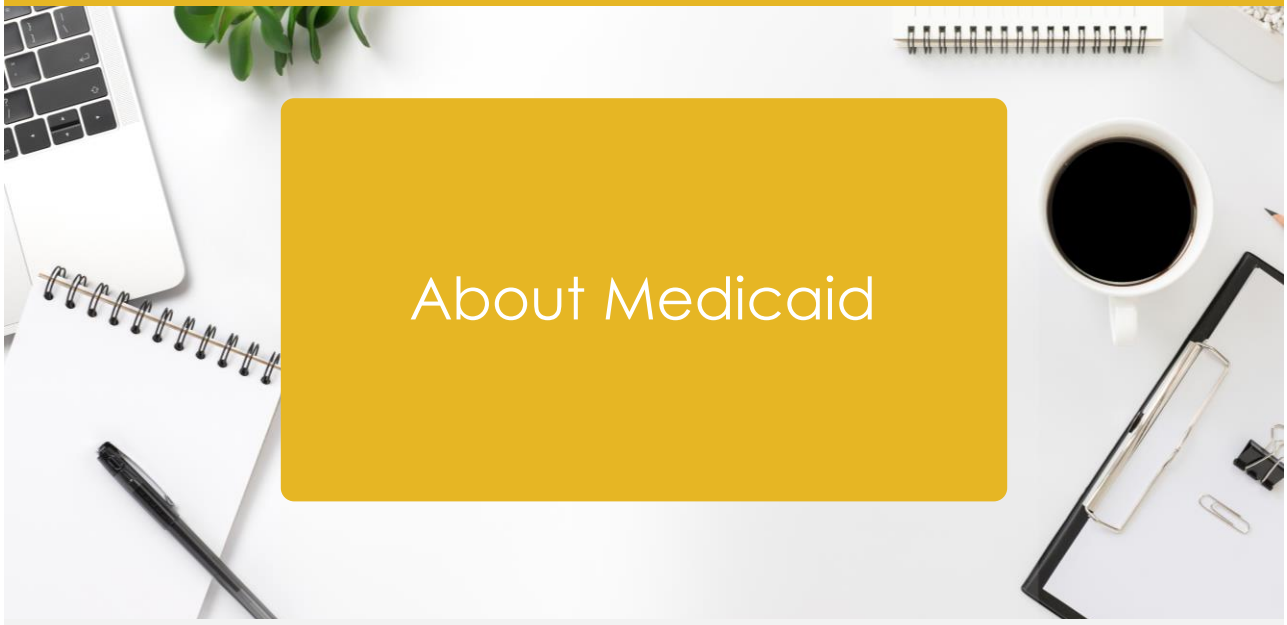
**PROVIDE** an introduction to the Medicaid program and its requirements.

**DISCUSS** the history of Qualified Income Trusts and *Miller v. Ibarra* case.

**DEFINE** the requirements of a Qualified Income Trust and discuss the practical aspects of implementing them for your clients.







# About the Medicaid Program

- Medicaid is a joint federal and state-funded program meant for those with limited means.
- Specific aspects of the Medicaid program vary from state to state.
- Applicants must meet both non-financial and financial criteria to qualify.



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# Non-Financial Requirements

- **Resident of a Medicaid-approved facility.**
  - In most cases, this refers to a nursing home.
- **U.S. citizen or qualified alien.**
- **65 or older, blind, or disabled.**



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# Asset Requirements

**INSTITUTIONALIZED INDIVIDUAL**

Applicant is allowed to keep $2,000 in countable assets.

**COMMUNITY SPOUSE**

Community spouse is allowed to keep a separate amount known as the Community Spouse Resource Allowance (CSRA).



# Community Spouse Resource Allowance

- **Standard States**
  - The community spouse is entitled to a standard CSRA, typically $148,620.
- **Minimum/Maximum States**
  - The community spouse is allowed to retain one-half of the countable assets as of the "snapshot date."
    - The snapshot date is the day the institutionalized individual entered care on a continuous basis.
  - The CSRA cannot fall below the minimum figure (typically $29,724) and cannot exceed the maximum figure (typically $148,620).

# Exempt vs. Countable Assets

**Exempt assets** do not count toward one's resource allowance.

**Examples include:**

- Primary residence
- One vehicle
- Personal property
- Funeral Expense Trust

**Countable assets** do count toward one's resource allowance.

**Examples include:**

- Checking, savings, or money market accounts
- Stocks and bonds
- IRAs (in most states)
- Secondary vehicles or property



# Income Requirements

## INSTITUTIONALIZED INDIVIDUAL

Income typically cannot exceed the private-pay rate of the facility.

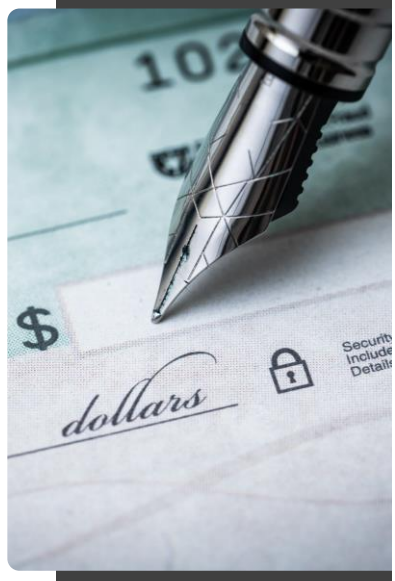
## COMMUNITY SPOUSE

There are no limits on the income of the community spouse.

May be entitled to some of the institutionalized spouse's income if theirs is low.

# Monthly Maintenance Needs Allowance

- The MMNA is the amount of monthly income to which a community spouse is entitled.
- If their income is below this amount, they are entitled to a shift in income from the institutionalized spouse dollar-for-dollar until the allowance is met.
- Some states apply one standard figure that the community spouse is always entitled to (currently $3,715.50 in most states).




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# Minimum/Maximum MMNA

- Other states apply a minimum and maximum allowance.
- The community spouse is always entitled to at least the minimum (currently $2,465 in most states), but may be entitled to a larger amount, not to exceed the maximum (currently $3,715.50 in most states).
- This is calculated using the **Standard Utility Allowance** and the **Shelter Standard**.

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# Standard Utility Allowance

- Rather than calculate actual utility expenses, the state Medicaid agency will apply a standard figure to count toward the community spouse's shelter expenses – this is the **Standard Utility Allowance**.
- The figure varies from state to state.
  - Example: Arizona's is $325 and Wisconsin's is $471.



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# Shelter Standard

- The **Shelter Standard** is the amount of monthly shelter expenses a community spouse is responsible for.
- If their shelter expenses exceed this amount (currently $740 in most states), their MMNA is increased dollar for dollar from the minimum, not to exceed the maximum.

**Shelter expenses include:**

- Mortgage, rent, or condo fees
- Homeowner's insurance
- Real estate taxes
- Standard Utility Allowance

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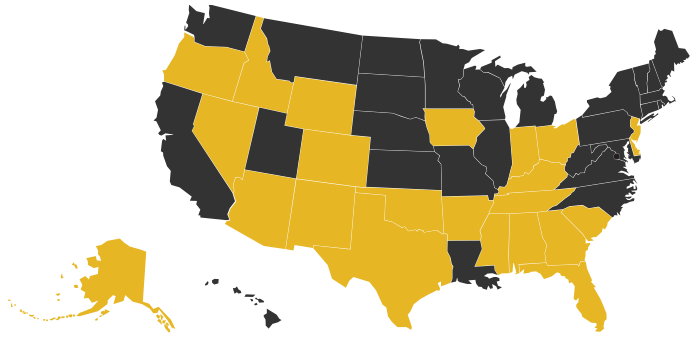
# Additional Income Regulations

- Some states apply an **income cap** for the institutionalized individual.
- This amount typically represents 300% of the current Federal Benefit Rate, which is $2,742 in 2023.
  - Exception: Delaware recognizes the income cap at 250% of the FBR.
- If the applicant's income exceeds this amount, it does not mean they cannot qualify for Medicaid, it means they must establish a **Qualified Income Trust** (or "Miller Trust").



# Qualified Income Trust

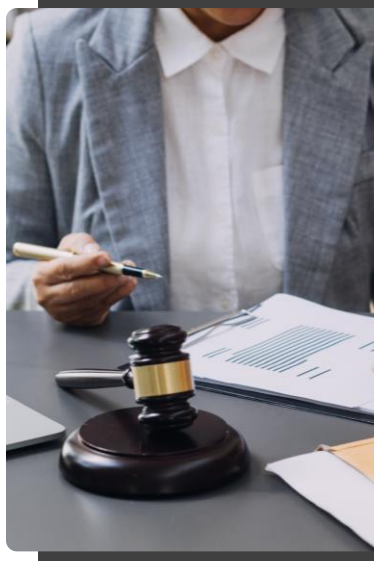
- A QIT is an irrevocable, income-only trust that is established for the sole purpose of Medicaid eligibility in states that apply an income cap.
- It allows an individual with income in excess of the cap to still qualify for Medicaid benefits.



**States that require a QIT include:**
AL, AK, AZ, AR, CO, DE, FL, GA, ID, IN, IA, KY, MS, NV, NJ, NM, OH, OK, OR, SC, SD, TN, TX, and WY.

# History of the QIT

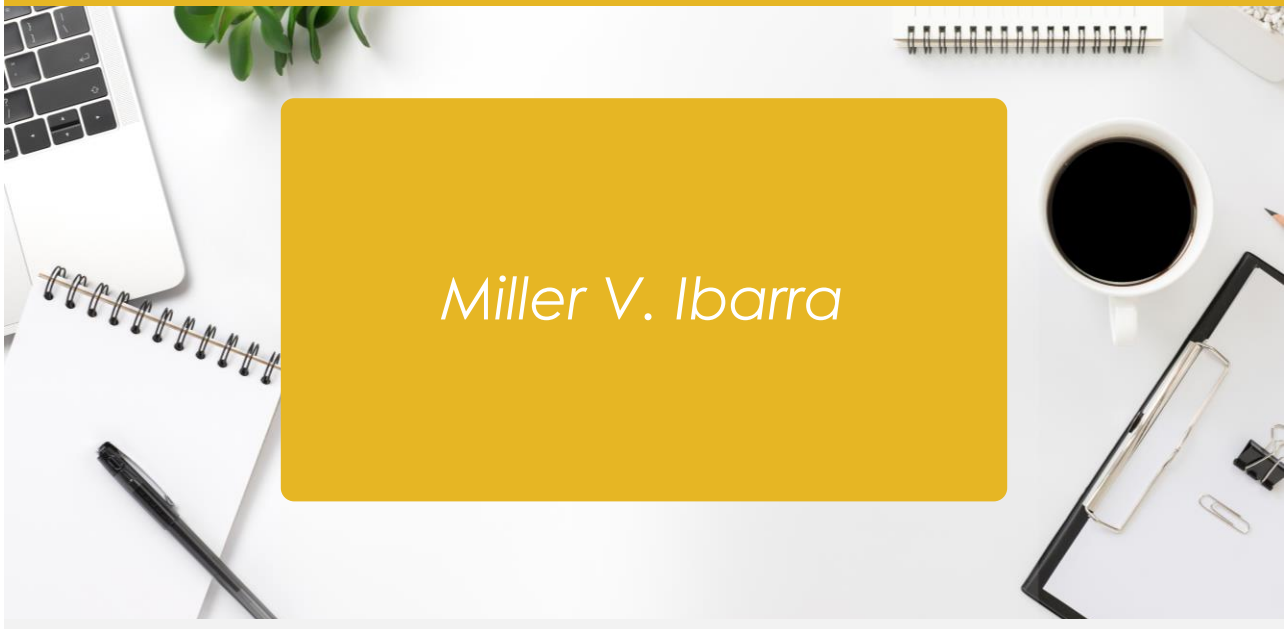
- The QIT was established out of a landmark case in Colorado, *Miller v. Ibarra.*
- The case examined the issue many individuals faced – their income exceeded the cap, but was less than the private pay rate of the facility.
- This left many otherwise-deserving applicants with no options other than to completely deplete their assets, and they *still* couldn't qualify for benefits after that.



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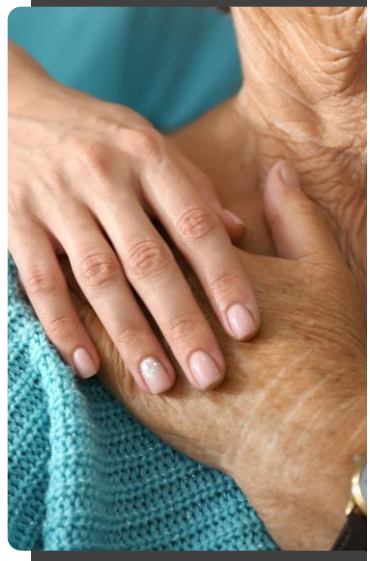

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# Background

- Four women in Colorado were denied Medicaid benefits because their income exceeded the income cap.
- The women each had different ailments, including Parkinson's Disease, Alzheimer's dementia, heart failure, multiple sclerosis, and other medical issues.
- Each woman required a high level of care due to their physical and mental limitations.



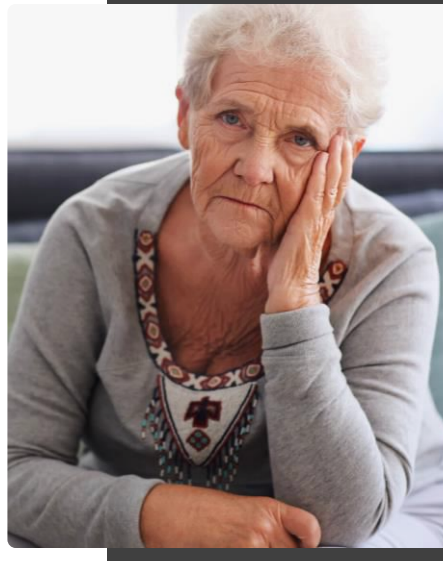
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# Background

- Despite having limited means, each Plaintiff was in a financial situation that presented income eligibility issues.
- The women were ordered by their respective district court to create a trust to hold their income, only to be distributed for their basic living needs and in limited amounts.
- After reapplication, each woman was still denied benefits.



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# Background

- Jeanette Miller came before the United States District Court for the District of Colorado as representative for the lead Plaintiff.
- District Court Judge James R. Carrigan described the case backdrop:

> The legal representatives of four aged, infirm and mentally incompetent women commenced this lawsuit in an effort to extricate their charges from the "Utah Gap." That is the popular nomenclature for a "Catch 22" in state health care policy that deprives many senior citizens of Medicaid payments for nursing home expenses to which they are otherwise entitled. When their incomes are too low to enable them to pay their own nursing home costs, but too high to qualify for Medicaid benefits, these claimants are ensnared in a trap created by the interaction of highly technical federal and state statutes and regulations. They are not allowed to pay as much as they can, and have Medicaid pay the balance, but instead are totally disqualified for any Medicaid assistance.



# Issues at Hand

Should the income placed in the trust be considered available for Medicaid purposes?

Does creation of the trust constitute an improper transfer of assets?

# Availability

Should the income placed in the trust be considered available for Medicaid purposes?

- The Court cited Federal and Colorado State eligibility states, confirming that only income that is "available" to the claimant may be counted for eligibility purposes.
- Plaintiffs argued that the creation of their trusts "divested them of all ownership rights," which rights were then vested in the trustees.
- Defendants did not directly address the issue of "availability," instead arguing that placing funds into those trusts constituted transfers for less than fair market value.



# Availability

Should the income placed in the trust be considered available for Medicaid purposes?

- The Court relied upon the POMS provision on trusts, which indicated that the principal of a trust is not a resource to the claimant if their access to that principal is restricted.
- The Court also looked to Colorado trust regulations, which explained that if a claimant has the right to use the property in a trust as well as the authority to dispose of that right, the property is considered an available resource. 9 Colo. Code Regs. § 3.210.16 (1987).
- The Court granted summary judgment in favor of the Plaintiffs on the issue of trust fund availability: "I conclude that each plaintiffs' annual income, for purposes of determining Medicaid eligibility…is the maximum amount the trustees of that plaintiff's trust can distribute, assuming the full exercise of discretion on the part of each trustee."

# Improper Transfer

Does creation of the trust constitute an improper transfer of assets?

- In its analysis, the Court cited congressional intent in creating the transfer rules:

> One purpose evident in the federal and state Medicaid laws, like their counterparts in the programs of Aid to Families with Dependent Children, is to prevent abuse of the Medicaid system. For example, federal and state laws provide for periods of ineligibility when individuals attempt to become eligible for Medicaid benefits by disposing of assets.

- Defendants argued that the creation of the trusts at issue constituted a transfer for less than fair market value in that the purpose of their creation was to obtain Medicaid eligibility, the transfer to the trusts was done without any consideration, and that they were intended to create fictional barriers.



# Improper Transfer

Does creation of the trust constitute an improper transfer of assets?

Plaintiffs countered that regardless of the income availability discussion, the transfer rules did not apply because:

1. The transfers were not voluntary;
2. The creation of the trust did not constitute a "transfer"; and
3. That the transfer rules were intended to prevent the transfer of "resources" or principal, not income.

# Improper Transfer

Does creation of the trust constitute an improper transfer of assets?

The Court made the following determinations as to the improper transfer issue:

1. The transfers were not voluntary because a probate court must first establish incompetency before ordering the creation of a trust;
2. That the transfer was not one that could be imputed to the plaintiff; and
3. That the payments placed in trust for plaintiffs were not resources and therefore not transfers prohibited by 42 U.S.C. § 1396p(c).



# Conclusion

**The Court Held:**

- Incomes of mentally incompetent nursing home patients which were subject to judicially imposed trusts created pursuant to Colorado statute could not be considered "available" to the patients for purposes of terminating Medicaid eligibility; and
- Acts of Colorado probate courts creating trusts in favor of mentally incompetent nursing home patients were not violations of the transfers for less than fair market value or transfers of resources rules.








# Omnibus Budget Reconciliation Act of 1993 (OBRA93)

- This was President Clinton's first budget proposal to tackle the national debt by increasing taxes and also changing many of the Medicaid qualification rules.
- The new rules addressed asset transfers and carved out an exemption formally for the Miller Trust in 42 USC 1396p(d)(4)(b).

# 42 USC 1396p(d)(4)(b)

The requirements of a qualified income trust:

- the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust), and
- the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.




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# HCFA Transmittal No. 64, 3259.7(C)

Miller-type or Qualifying Income Trusts (QIT)

- The trust must be composed only of income to the individual from whatever source but no resources may used to establish or augment the trust. Inclusion of resources voids this exception.
- The trust must be irrevocable.
- Income placed in the trust is not available and therefore not countable for Medicaid eligibility.
- Transfer of assets penalties do not apply to income placed in the trust so long as it is paid out of the trust for the medical care provided to the individual and will be considered a fair market purchase of care.

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# **State Statutes:** Kentucky Example

907 KAR 20:030 Section 3 (5)

- An individual may create a qualifying income trust, in accordance with this subsection, to establish financial eligibility for Medicaid.




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# **State Statutes:** Kentucky Example

(a) A transfer of resources shall not apply to qualifying income if:

(1) The trust is established in Kentucky for the benefit of an individual;

(2) The trust is composed solely of the income of the individual, including accumulated interest in the trust;

(3) Upon the death of the individual, the department receives all amount remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual by Medicaid; and

(4) The trust is irrevocable.

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# **State Statutes:** Kentucky Example

(b) The money in a qualifying income trust shall:

(1) Be maintained in a separate account; and

(2) Not be commingled with any other checking or savings account.

(c) The corpus of a qualifying income trust and interest generated by the trust shall not be counted as available income for an individual for the determination of Medicaid eligibility.




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# **State Statutes:** Kentucky Example

(d) A qualifying income trust shall state that the funds shall only be used for:

(1) Valid medical expenses, including patient liability; and

(2) The community spouse income allowance established in accordance with 907 KAR 20:035

(e) All expenditures from a qualifying income trust shall require verification by the department that the expenditures are allowable expenditures.

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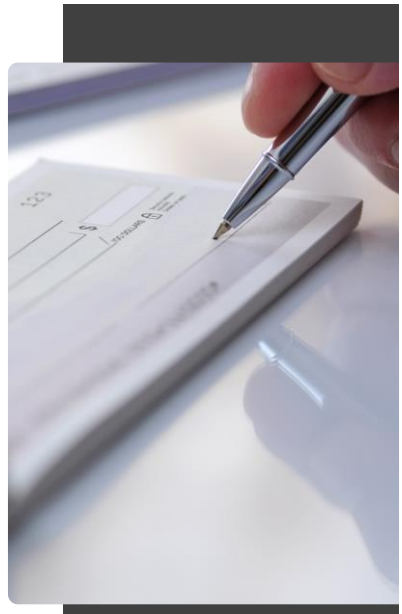
# **State Statutes:** Kentucky Example

(f) Allowable payment from a qualifying income trust shall be made:

(1) Every month; and

(2) By the end of the month following the month the funds were placed in the trust

(g) If payment by the qualifying income trust are made for medical care, the individual shall be considered to have received fair market value for income placed in the trust.



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# Requirements of a QIT

- The trust be irrevocable.
- Must only contain the income of the institutionalized individual (no assets).
- A trustee must manage the administration and expenditures of the trust.
- The state Medicaid agency must be named primary beneficiary of the trust up to the amount of benefits provided on behalf of the individual.




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# When to Use a QIT

- A QIT is required when the applicant's **gross income** exceeds the cap.
- **Do not** consider any income deductions when determining whether a trust is needed, including:
  - Personal Needs Allowance
  - Potential shift under the MMNA Rules
  - Other medical expenses
- ***When in doubt, plan conservatively and establish the trust!***

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# Establish a Bank Account

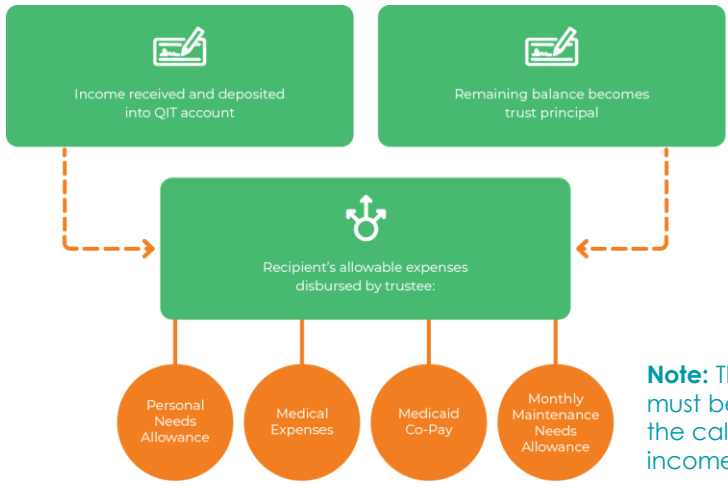
- After establishing the trust, a bank account in the name of the QIT must be created.
- Income **in excess of the cap** is then deposited into the account and then distributed by the trustee for allowable expenditures.
- Note: Income should still be payable to the Medicaid applicant/recipient.
  - Example: Income from a Medicaid Compliant Annuity is not made payable in the name of the QIT; however, it can be automatically deposited each month into the QIT account.



# Allowable Expenditures

- Recipient's monthly Personal Needs Allowance.
  - This amount varies from state to state – between $30 and $200.
- Spouse's shift under the MMNA rules, if eligible.
- Certain medical expenses, including supplemental insurance premiums.
- Recipient's Medicaid co-pay to the nursing home.
- **Remaining amount must stay in the trust!**

# Income Flow

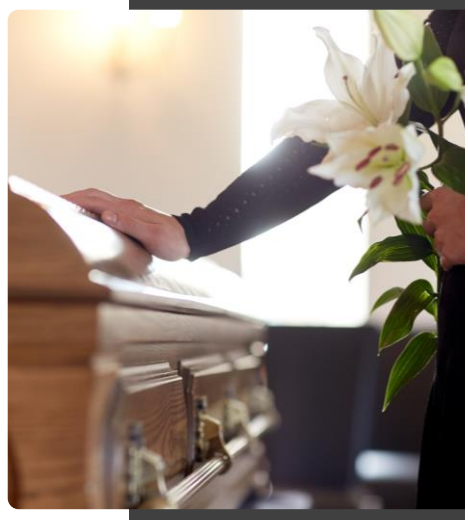



**Note:** The income flow must be completed within the calendar month the income is received.



# Death of the Recipient

- Upon death of the Medicaid recipient, the state Medicaid agency has the right to recover funds remaining in the trust.
- The state's right to recover cannot extend beyond the amount of benefits provided on behalf of the recipient.



# Timing of the Trust Creation and Funding

- The trust must be established prior to submitting a Medicaid application and reviewed prior to Medicaid qualification.
- Income should be deposited into the Miller trust each month once established and the trustee should start to make authorized payments during the qualification process to ensure continued "otherwise eligible" status.



# Form of the Trust

Some state Medicaid agencies have provided forms available to use for the qualified income trust:

- AL Alabama
- AR Arkansas
- GA Georgia
- IN Indiana
- IA Iowa
- MS Mississippi
- NJ New Jersey
- OH Ohio
- OR Oregon
- SC South Carolina

# Form of the Trust

**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.



# Power of Attorney

- Generally the trust can be created under a properly drafted power of attorney or by a spouse if the client does not have capacity to create a trust.
- If there is no power of attorney or spouse available the local court may need to be petitioned for a guardianship order to establish the qualified income trust.
- Review your state's power of attorney statute and understand exactly what language and execution is needed to authorize the agent to establish a trust.

# Power of Attorney

- Florida requires "super powers" to be specifically designated and initialed or signed by the principal for the agent to have that power.

**709.2202. Authority that requires separate signed enumeration**

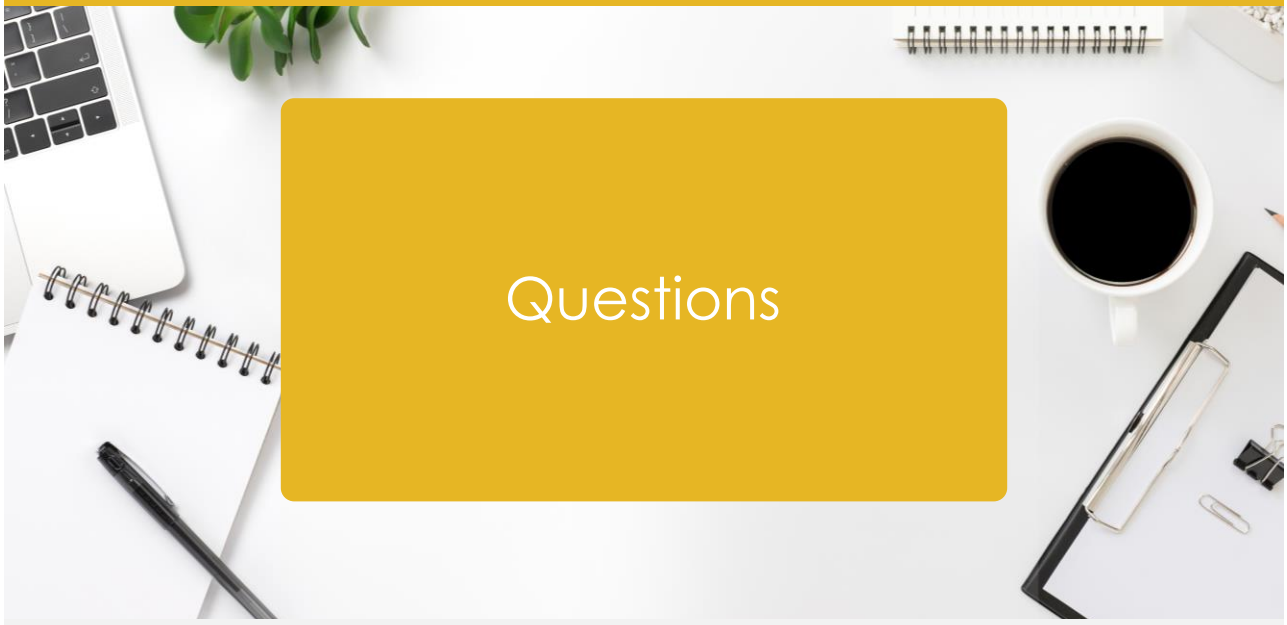
Currentness

(1) Notwithstanding s. 709.2201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, and the exercise is not otherwise prohibited by another agreement or instrument:

(a) Create an inter vivos trust;

(b) With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;






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