

IRREVOCABLE “5-YEAR” TRUST

This strategy is for older adults who are healthy and do not expect to require long-term care for the next five years (for those who are expected to require long-term care in the short-term, we have other strategies to utilize).

One way you may divest yourself of assets for Medicaid Planning is to gift or transfer assets to an Irrevocable Medicaid Trust. Because the transfer of assets to the Trust is a gift, Medicaid penalizes it and uses the five-year “look-back” – in other words: utilizing this strategy is **purposefully subjecting yourself to a period of Medicaid disqualification** should you need Medicaid in the next five years.

Yet, it can still be a good planning tool for the right people at the right time.

An "irrevocable" trust is a trust that, for the most part, cannot be changed after it has been created. The person establishing the trust is called the “Grantor.” In a Medicaid Planning context, the Grantor is the applicant and/or spouse. The Grantor/applicant names one or more persons, (not the applicant or the applicant’s spouse) to manage the trust. These persons are the “Trustees.” All or some of the applicant’s assets are put into the trust. These assets become the “principal” or “corpus” of the trust. Every trust agreement has a beneficiary and often more than one. A beneficiary is a person or organization who is to benefit from the income and/or principal of the trust. The Irrevocable “5-Year” Trust cannot name the applicant or the applicant’s spouse as a beneficiary of the principal; were it otherwise, the government would be able to count it. Others can be named beneficiaries. This might be a child or children or other relatives but can be almost anyone. However, the applicant and/or the applicant’s spouse can be (and usually are) named beneficiaries of the income of the Trust.

The irrevocable trust can hold any type of asset.

- **Income derived from these assets can be distributable to the Medicaid applicant**, the applicant’s spouse, or the applicant’s children. However, if an applicant moves to a nursing home, and the applicant was previously receiving trust income distributions, the income will have to go to the nursing home. While the applicant is at home or in an ALF, they would continue to receive their income.
- **But, principal can never be distributed to the applicant or the applicant spouse.** Principal distributions, if allowed at all, can be made only to the children or other listed beneficiaries. In this way, the principal is not counted as an available asset to the applicant for Medicaid purposes.



MIAMI-DADE OFFICE: 2641 NE 207TH STREET, #100, AVENTURA, FL 33180
BROWARD OFFICE: 8551 WEST SUNRISE BOULEVARD, #102, PLANTATION, FL 33322

Tel. 305.931.0478 • Fax: 305.931.7848
WWW.ELDERNEEDSLAW.COM

The future applicant and/or the spouse can keep money out of the trust to spend during the 5-year look-back period. Also, remember that the spouse of the applicant, so long as he or she is not applying for Medicaid, can have \$130,380.00 (as of January 1, 2021) on the day the applicant applies for Medicaid. This means that money can still be held outside of the Trust and controlled by the applicant and/or spouse subject to when application is made. The firm will guide you through the decision of how much to keep outside of the Trust.

Use of the Irrevocable Trust helps avoid probate on all assets transferred to the Trust because the trust rather than your Will directs where the property is to go upon death. The trustee of the trust will manage your assets, and the trust may be kept in place after the death of the Grantor to help manage the assets for the Grantor's family.

Importantly, the trust avoids the drawbacks of transfers of assets to children.

If you gift money to children and:

- they are not good at managing money, it can all be lost.
- they get divorced, their ex-spouse likely gets ½ of your assets.
- they have creditors, your assets are subject to collection actions.
- they do not pay their taxes, your asset are subject to their IRS actions.
- they pass away, your assets pass to their heirs per their (not your) estate plan.

At your death the principal in the irrevocable trust can then be paid to your heirs as you direct.

The main drawback of an irrevocable trust is that the Grantor immediately loses access and control over the principal. If we made the trust become irrevocable only upon incompetency or entry into the nursing home, the principal would be considered an available asset, and the purpose of creating this trust would be defeated. So, understand that once your assets are put into this trust, you cannot gain access to them even if you needed them for some other purpose.

The second drawback of the irrevocable trust is that after funding the irrevocable trust, you are not eligible for Medicaid for a period of five years, as you will need to wait out the five year look-back penalty phase of Medicaid. However, after the expiration of the five years, all of the trust principal will be considered an unavailable asset for Medicaid purposes without any gift penalty.



MIAMI-DADE OFFICE: 2641 NE 207TH STREET, #100, AVENTURA, FL 33180
BROWARD OFFICE: 8551 WEST SUNRISE BOULEVARD, #102, PLANTATION, FL 33322

Tel. 305.931.0478 • Fax: 305.931.7848
WWW.ELDERNEEDSLAW.COM

(Please note: A **revocable trust** can be altered or completely dissolved by the person who created it at any time. While this may give the person setting up the trust the feeling that they still have control over their assets, Medicaid considers all funds held by an applicant's revocable trust to be a countable asset when determining eligibility for home health care, ALF or nursing home Medicaid.

Revocable trusts still have a role in estate and asset protection planning but not as a vehicle to protect assets or as part of Medicaid Planning).

Irrevocable Trusts have tax consequences. **We are not tax experts and do not give tax advice or opinions.**

- Since IRS regulations and tax laws are ever-changing, we always advise you to discuss the matter with your CPA, accountant or other tax professional.

ADDITIONAL INFORMATION

- ❖ [Medicaid Irrevocable Five Year Trusts – FAQs Article](#)
- ❖ [General Information on Irrevocable Medicaid Asset Protection Trusts](#)



MIAMI-DADE OFFICE: 2641 NE 207TH STREET, #100, AVENTURA, FL 33180
BROWARD OFFICE: 8551 WEST SUNRISE BOULEVARD, #102, PLANTATION, FL 33322

Tel. 305.931.0478 • Fax: 305.931.7848

WWW.ELDERNEEDSLAW.COM