# ElderLaw Advisor

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## 4 Key Things to Know About Trusts and Medicaid Planning

There are many types of trusts that can be helpful in protecting your assets while allowing you to qualify for Medicaid. This article is a brief overview of the things you need to know when setting up a trust.

**It must be irrevocable:** An irrevocable trust cannot be altered or amended, and are thus the only type of trust that offers any benefit for Medicaid planning. That is because of the Medicaid law that says that if you can receive back from the trust any portion of the principal of the trust (i.e., the assets or cash that were used to fund the trust in the beginning), then the entire value of the trust becomes a countable asset for Medicaid eligibility purposes. If the trust isn't irrevocable (meaning you can change it) then Medicaid requires you to alter the trust terms to allow a distribution back to yourself. Thus, in order to be helpful for Medicaid purposes, the trust must be irrevocable and prohibit distributions of principal back to you for any reason. An irrevocable income-only trust is also possible, and such a trust can pay the income back to you for your lifetime to help you pay the

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## Maine Aging Initiative Mid-Year Report

In the Winter 2014 edition of the *ElderLaw Advisor,* we introduced you to the series of round table discussions being held to focus on the rapidly changing landscape of Maine's aging population. These round table discussions began in the fall of 2013 in partnership between the Maine Council on Aging (MCOA) and Maine Speaker of the House Mark Eves and were attended by a diverse group of leaders representing business, industry, finance, housing, philanthropy and state and municipal government. The ideas generated from these discussions provided a framework for further exploration with 400 people at the Maine Summit on Aging in January of 2014. From ideas generated and prioritized at the Summit, the MCOA and Speaker Eves crafted the Blueprint for Action on Aging and launched the Maine Aging Initiative in March of 2014.

Maine is facing an unprecedented challenge as a result of a rapidly aging population that is

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> *When everything seems to be going against you, remember that the airplane takes off against the wind, not with it.*
>
> ~ Henry Ford

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**4 Key Things to Know About Trusts and Medicaid Planning,** *continued from page 1*

bills, etc., without causing it to be counted as an available asset under the Medicaid rules. (Note that a transfer of your money or other assets into an irrevocable trust will be deemed a gift for Medicaid purposes, so it will cause a penalty period unless you apply for Medicaid at least five years after you fund the trust.)

**Revocable trusts are bad for Medicaid planning:** Trusts that can be revoked entirely or amended in part are commonly used for estate planning purposes and have the distinct benefit of permitting your estate to avoid probate upon your death. However, as mentioned above, such trusts have little use in Medicaid planning, since 100 percent of the assets in the trust will be deemed countable for Medicaid purposes. Thus, transferring your assets into a revocable trust will not accomplish your goal of protecting your assets.

**First-versus third-party trusts:** The "first-party trusts" discussed above are trusts that you establish yourself, and then fund with your own money. "Third-party trusts," on the other hand, are trusts that someone else sets up for you. For instance, a relative may have set up a trust for you within their will, to assist you in paying bills. If such a trust includes language that prohibits use of the trust funds to pay expenses otherwise payable by government entities (such as Medicaid), then no part of the trust will be countable, should you apply for Medicaid. Such a trust can even permit distributions of principal to you, unlike the first-party irrevocable trust discussed above. Such trusts are known as "Special Needs Trusts" or "Supplemental Needs Trusts" because they can only be used to supplement—and not replace—otherwise available government benefits.

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**Special trusts for disabled adults:** There is a type of first-party special needs trust that can contain your own assets, that can benefit you for your entire life, and that will instantly be non-countable for Medicaid purposes. Such a trust is known as a "(d)(4)(A)" trust—after the section of the Social Security law that describes this type of trust. In order for this to work, however, you must be under age 65 and disabled at the time the trust is set up, the trust must be established by a parent, grandparent, legal guardian or a court, on your behalf and for your sole benefit. The trust must also contain a "payback" provision. Such a provision must provide that, upon your death, the state be repaid whatever Medicaid benefits it provided to you, out of the trust assets. Of course, the trust may not even exist at that point, having been spent on various items to benefit you during your lifetime.

As you can see, the area of trusts can be very complicated! If any of the above interests you, be sure to consult with an experienced Elder Law attorney with experience both in Medicaid planning and trust drafting to assist you. While setting up a trust can be expensive, it is usually well worth the money for the benefits it will provide you in the long run.

# VA Imposing 3 Year Look Back for Transfers

On January 23, 2015, the Veterans Administration issued proposed changes in the Federal Register that would:

- Impose a 3 year look back for transfers of assets, including gifts to persons, trusts or purchases of annuities
- Deny claims for up to 10 years due to transfers
- Calculate widow's penalties almost twice as long as veteran's penalties

**Maine Aging Initiative Mid-Year Report,**
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living longer and in need of significantly more community supports. This challenge is exacerbated by a shrinking population of working-age residents and very low in-migration to the state as compared to other regions. A complicating factor is that many of our workers are also informal caregivers who are struggling to provide care with fewer available supports while maintaining their employment.

The Maine Aging Initiative was formally launched in May 2014 with the formation of five working groups made up of people with different skills and perspectives on the workgroup subject areas. The groups include over 100 people from across all sectors of the state's economy and have been working on their assigned priority focus areas for the last eight months.

- **Aging Friendly Communities Workgroup** is charged with developing best practices related to housing, transportation and community-based initiatives that support healthy aging. This group has drafted a white paper on accessory apartments providing concrete recommendations for towns to improve opportunities to help seniors live independently.
- **Health & Well-Being Workgroup** is working to develop and promote best practices for collaboration of health care and community-based care services, and for volunteer community-based navigation and health support of older adults. This group is exploring practices related to patient engagement, training of health and direct care workers, person-centered coordinated care, and senior and caregiver isolation.
- **Higher Education Workgroup** has a three-pronged mission, which includes 1) compiling data about research being conducted in Maine on aging and coordinating efforts statewide, 2) discovering best practices in educational models that support older adults with a goal of replicating these models, and 3) determining concrete steps to best support training to help older people engage in the workforce.
- **Public & Private Safety Workgroup** is charged with strengthening public communication about scams and frauds and increasing coordination between first responders, health and direct care workers and community organizations in order to support vulnerable older adults.
- **Workforce & Employment Workgroup** is charged with developing standards of best practices for employers related to caregiver and aging worker leave policies, flexible work schedules, information and training to support older workers who are extending careers or returning to work, and delving into the needs of working caregivers.
- **Legislative Aging Caucus.** In addition to these workgroups, the Maine Aging Initiative calls for the formation of a Legislative Caucus on Aging. The Caucus is forming now and will begin to explore ways legislators can work together to enact legislation that will help older adults age safely and independently in their communities.

We continue to be involved in these important efforts to give Maine elders a better quality of life with employment and housing opportunities that keep us active and engaged. We will keep you informed as progress is made.

## What is Elder Law?

Nale Law Office is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid/MaineCare, Medicare, Social Security, SSI, VA disability planning, care management, and fiduciary services.

## What Can We Do For You?

We frequently provide lectures for various groups in central and mid-coast Maine. A few suggested topics include estate planning, long-term care planning, MaineCare benefits, long-term care insurance and reverse mortgages. If your group is interested in any of these topics, please contact us at 207-660-9191 or sign-up at our website at www.nalelaw.com.

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## ELDERLAW ADVISOR

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- What Is A Gift?


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# What Is A Gift?

A gift is any transfer of real or personal property (e.g. money, house, car, jewelry, stock, etc.) from one person to another, made while the donor is still alive. To qualify as a gift, the property must be given by the donor without expectation of repayment by the donee.

The following transactions can also be considered "gifts" for tax purposes:

- A sale of property where the money received is less than the value of the property.
- Making an interest-free or below market interest rate loan.
- Forgiving a debt.
- Some kinds of property settlements in divorce proceedings.
- Surrendering a portion of an annuity to create a "survivor annuity" – an insurance product that makes regular monetary payments to the surviving holder of a policy, once the other holder has passed.

### When does a gift tax return have to be filed, and who is responsible for paying?

A gift tax return must be filed by a donor if he or she gives more than $14,000 (the current annual exclusion amount) in gifts in a given year to a particular individual. When gifts greater than $14,000 are given to a particular individual in a single year, then any amount over $14,000 may be subject to taxation, and will reduce the giver's estate tax exemption – also known as the "lifetime gift tax exemption" – by however much the gift exceeded $14,000.

The current lifetime gift tax exemption is $5,340,000. Gift taxes are filed using Form 709: United States Gift (and Generation-Skipping Transfer) Tax Return.

### How do gifts affect Medicaid/MaineCare eligibility?

Even if a gift is below the annual exclusion amount of $14,000, it may still be counted against the donor, should they attempt to qualify for Medicaid/MaineCare. When a person applies for Medicaid assistance to help pay for their long-term care expenses, the total value of their eligible assets is taken into account. If an applicant owns too much in countable assets, then they won't be able to receive Medicaid benefits.

Many families believe that a person can just give their money and other assets to family and friends in order to "spend down" their money for Medicaid. However, due to the five-year Medicaid look-back period, any gift made by an applicant during the five years leading up to the time when they want to qualify for government assistance will delay their ability to receive financial aid.