



**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
560 Wheeler Road, Hauppauge, NY 11788  
(631) 234-5588



## **TRUST IN TIME SERIES: An Overview of Medicaid Asset Protection Trusts**

### **FACULTY**

**Richard A. Weinblatt, Esq.**  
Haley Weinblatt & Calcagni, LLP

**Program Coordinators: Marianne Rantala, Esq., Jay P. Sheryll, Esq., Ashley Valla, Esq.,  
Janna Visconti, Esq.**

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**Richard A Weinblatt**  
*Attorney at Law*

Richard A. Weinblatt is a partner in the law firm of Haley Weinblatt & Calcagni, LLP located in Islandia, New York. He practices primarily in the areas of Elder Law and Trusts and Estates. Richard graduated *magna cum laude* from St. John's University School of Law in 1988. He is a member of the New York State Bar Association, National Academy of Elder Law Attorneys and a former Director of the Suffolk County Bar Association. He is a Past Chair of the New York State Bar Association's Elder Law and Special Needs Section. Richard is a past Associate Dean of the Suffolk County Bar Association's Academy of Law, past President of the Estate Planning Council of Long Island, Suffolk Chapter and is a former Co-Chair of the Suffolk County Bar Association's Elder Law Committee, Surrogate's Court Committee and Tax Committee. Richard is also an adjunct professor at Touro College Jacob D. Fuchsberg Law Center.

**Trust In Time Series:  
MEDICAID ASSET PROTECTION TRUSTS  
June 19, 2018  
Richard A. Weinblatt, Esq.**

**I. Introduction**

- A. The Irrevocable Income Only Trust is a valuable tool for Medicaid Planners. If properly drafted, these trusts can provide a continued source of income for the Grantor and protect the principal of the trust for the Grantor's intended beneficiaries, while at the same time allowing the Grantor to receive Medicaid benefits.
- B. The Income Only Trust is not a new Medicaid planning concept. Prior to August 11, 1993 these trusts were governed by 1986 Medicaid Qualifying Trust Legislation<sup>1</sup>. Effective August 11, 1993, these trusts are governed by the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66 (OBRA-93).
- C. This outline addresses Intervivos Income Only Trusts. It does not address testamentary trusts.
- D. When drafting an Income Only Trust the attorney must consider several issues including Medicaid eligibility, gift taxes, estate taxes and income taxes. These issues are discussed below.

**II. Medicaid Eligibility Rules.**

- A. General Financial Eligibility Requirements.
  - 1. Financial eligibility for Medicaid benefits is based upon the applicant's income and resources.
  - 2. Income.
    - a. For 2018, an individual applicant is allowed \$842 per month of income.<sup>2</sup> Income in excess of this amount must be spent down on

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<sup>1</sup> 42 U.S.C. §1396a(k)

<sup>2</sup> Plus \$20 per month for applicants 65 years of age or older, or who are blind or disabled. Income is limited to \$50 per month for a nursing home patient and \$391 per month for married long-term home health care recipients.

medical care before the individual is eligible to receive Medicaid benefits.

- b. The community spouse of a nursing home resident or long-term home health care recipient is allowed \$3,090.50 per month.

3. Resources.

- a. Effective 1/1/2018, an individual applicant is allowed \$15,150 of resources. In addition the applicant may have a burial fund in the amount of \$1,500 and an irrevocable pre-need funeral assignment in any reasonable amount.
- b. The community spouse of a nursing home resident or long-term home health care recipient is permitted a resource allowance of \$74,820, or  $\frac{1}{2}$  of the couple's resources up to a maximum of \$123,600.

III. Transfer of Assets.

A. 06 OMM/ADM-5.

1. Look-back period.

- a. The look-back period is 5 years for all transfers of assets made on or after February 8, 2006.

2. The penalty period does not apply to "community Medicaid" or to community-based waiver programs like the "managed long-term home health care program" ("MLTC").

- a. The penalty only applies to persons applying for nursing home care services.

3. Method of Calculation of Penalty Period

- a.  $\text{Transfer divided by Medicaid regional rate} = \text{penalty period.}$

4. Commencement of the penalty period for transfer made on or after February 8, 2006.

- a. Penalty period starts on the first day of the month after the transfer

**OR**

the date the institutionalized individual is otherwise eligible for **AND** receiving nursing facility services, whichever is later.

- b. Thus, the elements for the start of the penalty period are:

- (1) Applicant is receiving nursing facility services.

**AND**

- (2) Applicant is otherwise eligible (except for the penalized transfer).

- (a) Resources at or below \$15,150

- (b) Income below the private pay rate for nursing home

- c. The establishment of the start of the penalty period is done by submitting a Medicaid application and receiving a Medicaid denial.

- d. Once the penalty period has commenced it continues to run even if the person no longer resides in a nursing home or continues to be eligible for Medicaid.

- 5. Multiple transfer are added together.

- a. All transfers during the look-back period are totaled and the sum is divided by the Medicaid regional rate to determine the penalty period. This is true even if each individual transfer did not equal a full month penalty.

- b. The penalty begins when the applicant is receiving nursing home care and is otherwise eligible.

- 6. Exempt transfers.

- a. Exempt transfers of Homestead.

- (1) To spouse, blind or disabled child, or child under age 21.

- (2) To sibling with an equity interest who has been residing in the home for 1 year immediately prior to institutionalization.
  - (3) To caregivers child who resided in the home for 2 year period immediately prior to institutionalization.
- b. Other exempt transfer of assets.
  - (1) To spouse or blind or disabled child.
  - (2) To authorized SNT.
  - (3) Transfer made for a purpose exclusively other than to qualify for Medicaid.
  - (4) DRA added the purchase of a life estate in another individuals home, provided that the purchaser resides in the home for a period of at least one year after the purchase.

#### IV. Special Rules for Trusts.

A. In determining an individual's eligibility for Medicaid benefits, Medicaid uses special rules<sup>3</sup> for trusts created with the individual's assets. The term "trust" includes any legal instrument or device that is similar to a trust.<sup>4</sup>

1. These special rules apply to trusts created by:

- a. The individual;
- b. The individual's spouse;
- c. A person, Court or agency with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
- d. A person, Court or agency acting at the direction or request of the individual or the individual's spouse.<sup>5</sup>

B. Income - includes trust income or principal paid to the individual.

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<sup>3</sup> See 42 U.S.C. §1396p(d)(3)(B)

<sup>4</sup> 42 U.S.C. §1396p(d)(6)

<sup>5</sup> 42 U.S.C. §1396p(d)(2)(A). But see Soc. Serv.L§366(2)(b)(2), which has not included language regarding third persons or courts in New York's adoption of OBRA-93.

C. Available Resources - include trust income and principal that could be paid to the individual.

D. Transfers.

1. Transfers made by an individual or the individual's spouse into a trust that may not pay principal to the individual or the individual's spouse are subject to penalty, and the look-back period is 60 months.
2. Payments from an irrevocable trust to a third party that could have been made to the individual are subject to penalty, and the look-back period is 60 months for transfers made on or after 2/8/06.

V. The Irrevocable Income Only Trust.

A. Overview.

1. The basic irrevocable income only trust is a trust that pays all of its income to the grantor for life and pays the trust principal to the grantor's children, or other intended beneficiaries, upon the grantor's death.
2. The invasion of principal for the benefit of the grantor is prohibited.
3. The invasion of principal for the benefit of third parties may or may not be permitted.
4. The power of a court to invade the principal for the benefit of the grantor is prohibited.<sup>6</sup>

B. Purposes.

1. Allows the grantor to protect the principal of the trust against the cost of long-term care.
2. Permits a continued source of income to the grantor prior to the need for long-term care.
3. Use of a special power of appointment may allow the grantor to retain control over the distribution of principal upon the grantor's death.
4. If funded with a homestead, it allows flexibility with respect to a future sale of the homestead.

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<sup>6</sup> EPTL § 7-1.6

- C. Advantages of the income only trust as compared to outright transfers.
  - 1. The grantor continues to receive the income generated from the transferred assets.
  - 2. During the grantor's lifetime, the income and principal are insulated from claims against the remainder beneficiaries.
  - 3. Gift taxes can be avoided by keeping the gifts incomplete.
  - 4. Capital gains taxes can be avoided.
  - 5. The grantor may retain some control over intended beneficiaries.
  - 6. Increased flexibility regarding the sale of certain assets.
- D. Advantages of outright transfers as compared to transfers in trust.
  - 1. Less complex than transfers in trust.
  - 2. Less expensive to effectuate.

VI. Issues to Consider in Drafting the Trust.

- A. Trust Must Be Irrevocable.
  - 1. In order for the trust principal to be unavailable for Medicaid, the trust must be irrevocable.
  - 2. Trusts are deemed to be irrevocable unless expressly declared to be revocable.<sup>7</sup>
- B. Income.
  - 1. Generally, all income is payable to the grantor. The trust can provide that only a portion of the income, or none of the income, shall be paid to the grantor.

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<sup>7</sup> EPTL § 7-1.16



2. The income actually paid to the grantor is counted as available income. Income that could be paid but is accumulated is counted as an available resource.
3. A provision that terminates the grantor's right to receive income upon the grantor's need for long-term medical care is void as against public policy.<sup>8</sup>
4. The Trustee could be authorized to invest in non-income producing assets.

C. Distribution of Principal During the Grantor's Lifetime.

1. Generally, the trust prohibits any invasion of the trust principal. However, the trust may provide for invasion of principal for the benefit of the grantor or third parties.
2. Principal payments made to the grantor are treated as income when made.
3. The portion of the principal that could be paid to the grantor is treated as an available resource. The trust should contain a specific provision negating the provisions of EPTL 7-1.6, which may permit a court to invade the principal for the benefit of an income beneficiary. The drafter should also consider the provisions of EPTL 7-1.11, which may permit a trustee to invade principal for the grantor's payment of income taxes on grantor trusts.

D. Distributions Upon Grantor's Death.

1. Generally, the trust terminates upon the grantor's death and the trust principal and accumulated income are distributed to the grantor's children or other intended beneficiaries. The trust may, however, be drafted to continue for remainder beneficiaries.
2. The trust should not require, but may permit, the trustee to pay or make available to the grantor's estate sufficient cash to pay estate taxes, debts, expenses and bequests.

E. Trustee Beneficiaries.

1. A trustee who is also a beneficiary should not be given the discretionary power to invade the trust principal for himself or herself. Such a power is a general power of appointment and causes inclusion of the value of the trust in the trustee's estate if the trustee dies prior to termination of the trust.

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<sup>8</sup> EPTL § 7-3.1

Accordingly, the powers of invasion for a trustee beneficiary should be limited to ascertainable standards.

2. If unlimited power to invade by the trustee is desired, however, care must be taken to comply with EPTL § 10-10.1 which requires that express reference to that section be made in the trust agreement.

F. Gift Taxes.

1. A transfer to the trust is a completed gift that is subject to federal gift tax.
2. The completed gift can be avoided if the grantor retains a special power of appointment over the trust principal.<sup>9</sup>

G. Estate Taxes.

1. Since the grantor retains the right to receive the income from the trust, the entire trust, valued as of the date of the grantor's death, is included in the grantor's estate.<sup>10</sup>
2. Inclusion of the trust in the grantor's estate may avoid capital gain taxes for the estate and/or the estate beneficiaries.

H. Income Taxes.

1. Consideration should be given to who will be responsible to pay the income taxes.
2. In general, if the trust is a grantor trust, all of the income, whether distributed or not, will be taxed to the grantor.

I. Keep the Irrevocable Trust Revocable.

1. With the consent of all beneficiaries, the grantor may revoke or amend the trust.<sup>11</sup>

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<sup>9</sup> Reg § 25.2511-2(c)

<sup>10</sup> I.R.C. § 2036

<sup>11</sup> EPTL § 7-1.9

2. Consider naming only adult competent persons as remaindermen. Reservation by the grantor of a special power of appointment allows the grantor to change the remaindermen.

#### J. Additional Trust Provisions

##### 1. Special Power of Appointment

- a. A power can be retained by the grantor over income and/or principal to change the disposition set forth in the trust. However, this power cannot be exercised in favor of the grantor, his creditors, his estate or estate creditors (otherwise it would be a general power of appointment and the entire trust would be deemed available).
- b. The purpose of reserving a Special Power of Appointment is that it keeps the gift incomplete, control over the beneficiaries (keeps kids as trustees in line), invokes the grantor trust rules over principal and keeps the trust revocable under EPTL § 7-1.9.<sup>12</sup>

##### 2. Grantor Trust Rules (IRC §§ 671-677)

- a. If grantor trust rules apply, the trust is taxed as being owned by the grantor and not by the trust.
- b. The benefit of invoking the trust rules include that the trust will be taxed through the grantor using the lower individual tax rates rather than the more compressed trust rates. However, the grantor's right to income already gives the grantor this benefit. In addition, taxing the grantor instead of the trust on capital gains allows for the 121 exclusion on the sale by the trust of the grantor's primary residence.
- c. Section 677 treats the grantor as the owner of any portion of a trust over which he may receive income. This is the typical income only trust. This power, however, does not give grantor trust status over the corpus, which is necessary for the 121 exclusion.
- d. Section 674 can be invoked by providing the grantor with a Special Power of Appointment. A lifetime Special Power of Appointment over principal causes capital gains to be taxed to the grantor (674(a)) versus a Testamentary Power of Appointment over principal, which

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<sup>12</sup> EPTL § 7-1.9 permits the grantor and all interested beneficiaries to revoke the irrevocable trust.

may cause capital gains to be taxed to the grantor if they are accumulated and added to the principal (674(b)).

- e. Section 675(4)(c) states that a grantor will be treated as the owner of any portion of a trust in respect of which the grantor has a power, in a non-fiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to reacquire the trust corpus by substituting other property of an equivalent value. While this power should cause capital gains to be taxed to the grantor, it does not independently cause estate inclusion required for a step-up in basis; however, the retained income will.

(1) Caution for Florida Medicaid

- (a) Fair hearing decisions in Florida have held that the substitution power makes the trust an available resource.
- (b) Florida attorneys do not use the substitution power, but instead use a combination of a special testamentary power of appointment reserved by the grantor, as well as the appointment of a trust protector with the power to add charitable beneficiaries.

K. Joint Trusts.

- 1. For a federally taxable estate, the use of a joint trust for the grantor and the grantor's spouse raises estate tax issues. Consideration must be given to the use of the marital deduction and unified credit.
- 2. A joint trust cannot be revoked upon the death of the first grantor to die.

L. Placing the Grantor's Residence in the Trust.

- 1. When planning to protect the grantor's residence from Medicaid liens or estate recovery, consideration should be given to placing the residence in trust, transferring it outright, or transferring it subject to a life estate.
- 2. Consequences of a Transfer to the Trust.

- a. Penalty period for Medicaid based upon the fair market value at time of transfer.
  - b. Grantor should be able to retain any Senior Citizen, STAR and Veteran's exemptions.
  - c. Subsequent sale by the trustee does not affect Medicaid eligibility.
  - d. If the trust is a grantor trust, IRC §121 exclusion from capital gain should be available.
  - e. Taxable gift unless kept incomplete.
  - f. Included in grantor's estate with corresponding step-up in basis if not sold prior to grantor's death.
3. Consequences of Transfer with Retained Life Estate.
- a. Penalty period for Medicaid based on the fair market value of the remainder interest. The value of the retained life estate escapes the penalty.<sup>13</sup>
  - b. Grantor should be able to retain any Senior Citizen, STAR and Veteran's exemption.
  - c. Subsequent sale of the property results in the then value of the life estate becoming an available resource for Medicaid eligibility.
  - d. IRC §121 exclusion from capital gains is only available for the life estate portion of the sales proceeds.
  - e. Included in grantor's estate with corresponding step-up in basis if not sold prior to grantor's death.
4. Consequences of an Outright Transfer.
- a. Penalty period for Medicaid based upon the fair market value at the time of transfer.

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<sup>13</sup> See 96 ADM 8 for the table to value life estates and remainder interests.

- b. Loss of Senior Citizen, STAR and Veteran's exemptions.
- c. Present gift with carryover basis.
- d. Not included in grantor's estate (but is considered as prior taxable gift for estate tax purposes).

VII. Creation of the Trust.

A. Execution of the Trust.

- 1. Trust must be in writing, and executed and acknowledged by the grantor in the same manner as required for the conveyance of realty.<sup>14</sup>

B. Funding.<sup>15</sup>

- 1. Effective December 25, 1997, a transfer to a lifetime trust is not accomplished by merely reciting in the trust that the grantor is assigning all of the property listed in Schedule A.
- 2. For trusts where the grantor is the sole trustee, the transfer of assets capable of registration, such as real estate, stocks and bonds, requires that these assets be registered to the trust.
- 3. It is not clear from the statute whether or not registration is required for lifetime trusts where the grantor is not the sole trustee. If such registration is not required the transfer must comply with existing case law. The case law mandates that the grantor have an intent to make the gift to the trust and that the assets were delivered to the trustee. It is recommended, however, that even where the grantor is not the sole trustee, registration should be made in the same manner as if the grantor were the sole trustee.

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<sup>14</sup> EPTL § 7-1.17(a)

<sup>15</sup> EPTL § 7-1.18

**SAMPLE BASIC MEDICAID ASSET PROTECTION TRUST**  
**THE ANNE SMITH ASSET MANAGEMENT TRUST**

***THIS TRUST AGREEMENT*** (hereinafter referred to as the “Agreement”) made as of the \_\_\_\_ day of June, 2018, between **ANNE SMITH**, residing at 1234 Sesame Street, Melville, New York 11747 (hereinafter referred to as “Grantor”) and her daughter, **LUCY SMITH**, residing at 5678 Easy Street, Melville, New York 11747 (hereinafter referred to as “Trustee”).

WHEREAS, Grantor desires to establish an irrevocable trust for the purposes of avoiding probate, avoiding estate administration and providing a vehicle for asset management in the event of Grantor’s disability or incapacity.

NOW, THEREFORE, it is agreed as follows:

**ARTICLE ONE**  
**GENERAL PROVISIONS**

1. ***NAME OF TRUST.*** This trust shall be known as the **ANNE SMITH ASSET MANAGEMENT TRUST** (hereinafter referred to as the “Trust”).

2. ***IRREVOCABILITY.*** This Trust is hereby declared to be irrevocable, and Grantor expressly waives the right to amend, alter, revoke or terminate the Trust or any of its terms, except as specifically provided herein.

3. ***TRUST PROPERTY.*** Grantor hereby assigns, transfers, conveys and delivers to the Trustee all of her right, title and interest in the assets specified in Schedule “A”, annexed hereto and made a part hereof, which property shall become part of the principal of the Trust. The Grantor, or any other person, subject to acceptance by the Trustee, may add additional property to the Trust (the initial trust property and any additions thereto are sometimes referred to herein as the

“Trust Estate”). All such additional property shall be subject to the provisions of this Agreement as if an original asset of the Trust.

**ARTICLE TWO**  
**DISPOSITION OF TRUST ESTATE DURING GRANTOR’S LIFETIME**

1. ***INCOME AND PRINCIPAL DISTRIBUTION.*** The Trustee shall hold, manage, invest and reinvest the Trust Estate, and shall pay or apply the income and principal of the Trust Estate, as follows:

(a) ***Distribution of Income.*** During Grantor’s lifetime, the Trustee, after deducting the expenses of administration of the Trust, shall pay to or apply for the benefit of Grantor, all of the net income of the Trust in convenient installments, but at least so often as quarter-annually.

(b) ***Distribution of Principal.***

(i) Under no circumstances may the Trustee invade the principal of the Trust for the benefit of the Grantor. The Grantor directs that the provisions of Section 7-1.6 of the New York Estates, Powers and Trusts Law, or any successor statute, shall not be applied by any court having jurisdiction of an express or testamentary trust to compel the payment or application of the principal of the Trust to or for the benefit of the Grantor for any reason whatsoever. This provision is specifically intended to negate and eliminate any discretion granted to any Court by Section 7-1.6 of the New York Estates, Powers and Trusts Law.

(c) ***Residential Real Property.*** In the event that the Trust holds residential real property, including shares in a cooperative apartment, used by the Grantor as a personal residence, Grantor shall have the right to the exclusive occupancy of said residential real property (or replacement residential real property). The Grantor shall not be responsible to pay rent for such



property, but shall be responsible for and required to pay all of the expenses of the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep of the property. Such right to exclusive occupancy may be waived in writing by the Grantor or her legal representative (including the holder of a durable power of attorney). Such written waiver by Grantor may include binding instructions to the Trustee for the sale of the residential real property and/or the purchase of a replacement personal residence for the Grantor of her own choosing. It is the intent of the Grantor herein to preserve or obtain any and all types of property tax exemptions which the Grantor would otherwise have been entitled to if the property had been held by her.

**ARTICLE THREE  
DISPOSITION OF TRUST ESTATE UPON GRANTOR'S DEATH**

1. ***LIMITED POWER OF APPOINTMENT.*** The Grantor hereby reserves a limited power to appoint the remainder of the Trust to or among any one or more members of a class consisting of the Grantor's issue, in any degree, whether presently living or born hereafter, in such proportions and amounts, without regard to equality, outright or in further trust, as the Grantor may direct and appoint:

(a) by written and acknowledged instrument executed by the Grantor, the Grantor's attorney-in-fact or a Court appointed guardian for the Grantor, making specific reference to this power of appointment; or

(b) by the Grantor's Last Will and Testament (the "Will"), validly admitted to probate, by specific reference hereto.

If the Trustee has not received actual notice of the Grantor's proper exercise of the limited power of appointment pursuant to Article Three, Paragraph 1(a) above or of the existence of a Will of the Grantor within ninety (90) days of Grantor's death, and if no Will has been offered for probate in the appropriate court of the state and county of Grantor's residence at death, then the Trust may be finally distributed as if the Grantor had not exercised the limited power of appointment granted herein, and the Trustee shall be released from any liability for distributing and terminating the Trust.

No such appointment shall be made to Grantor, her creditors, her estate or her estate's creditors under any circumstances.

2. ***DISPOSITION UPON DEATH.*** Upon the death of Grantor, subject to the exercise of the limited power of appointment created by Article Three, Paragraph 1 above, the Trustee shall distribute the remaining principal and undistributed income of the Trust (the "Trust Remainder") to Grantor's then living issue, per stirpes.

3. ***DISPOSITION TO PERSONS UNDER 21 YEARS OF AGE.*** Notwithstanding any provision of this Trust to the contrary, whenever any property distributed hereunder, whether principal or income, vests in a minor, the Trustee shall have the right as donee of a power during minority to hold and manage the same until such minor attains his or her majority. The Trustee, in such case, shall collect the income of such property and shall pay to and/or apply for the use or benefit of such minor so much or all of the net income and/or principal thereof as the Trustee, in his or her discretion, shall determine, accumulating any balance of such net income and adding such accumulations at least annually to principal. Payment or distribution may be made: (a) to the minor; (b) to the minor's guardian or other legal representative, wherever appointed, without requiring ancillary guardianship; (c) to an adult with whom the minor resides upon the agreement of such

person to expend such income and principal solely for the benefit of the minor; or (d) to a custodian for the minor under the Uniform Transfers to Minors Act of any jurisdiction; the receipt of the person to whom any such payment or distribution is made shall be a sufficient discharge even though a Trustee may be such person. When such minor shall attain the age of twenty-one (21) years, any remaining balance of such property then in the hands of the Trustee shall be paid to him or her. If such minor shall die before attaining such age, any such remaining balance shall, at such time, be paid over to the executors or administrators of the estate of such minor. Said donee shall not be required to give bond or security in any jurisdiction and shall not be required to render periodic accounts to any court. For purposes of this appointment, a minor shall be deemed to be a person who has not attained the age of twenty-one (21) years.

#### **ARTICLE FOUR POWERS OF TRUSTEE**

**1. *POWERS OF TRUSTEE.*** The Trustee shall have full power and authority to administer the Trust (except as may be expressly provided otherwise herein). In addition to those powers conferred by Section 11-1.1 of the New York Estates, Powers and Trusts Law or other law, and without limiting the generality of the foregoing, the Trustee shall have the following powers:

(a) **Retain Trust Estate.** To retain without liability for loss or depreciation, the original Trust assets and all additional Trust property, although the property so held may not be of the character, type, quality or diversity prescribed by law or by the terms of this instrument as proper for investment of trust assets.

(b) **Hold Uninvested Cash and Unproductive Property.** To hold cash uninvested, even though the total amount so held is disproportionate under trust investment law or

would not be permitted without this provision, and to retain or acquire and hold unproductive property. The use of any tangible property held in the Trust Estate may be provided to the income beneficiaries in lieu of income on such property.

(c) **Invest and Acquire.** To invest and reinvest Trust assets in any type of property or security, including stock market margin accounts, without regard to the proportion that investments of the type selected may bear to the entire Trust Estate, without limitation to the classes of trust investments authorized by law, and without regard to the possibility that the investments may be in new issues or in new or foreign enterprises. The property acquired may be realty or personalty and may include life insurance, bonds, debentures, leaseholds, options, easements, mortgages, notes, mutual funds (including index funds), investment trusts, common trusts, common trust funds, voting trust certificates, and any class of stock or rights to subscribe for stock, regardless of whether the yield rate is high or low or whether or not the new asset produces any income at all. It is intended that the Trustee shall have the authority to act in any manner deemed in the best interest of the Trust involved, regarding it as a whole, even though certain investments considered alone might not otherwise be proper.

(d) **Compromise or Abandon Claims or Property.** Upon whatever terms the Trustee deems advisable, to compromise, arbitrate, defend, or otherwise deal with any claims, including tax claims, against or in favor of the Trust; to abandon any asset the Trustee deems of no value or of insufficient value to warrant keeping or protecting; to refrain from paying taxes, assessments or rents, and from repairing or maintaining any asset; and to permit any asset to be lost by tax sale or other proceeding.

(e) **Use Nominees.** To hold any or all of the Trust assets, real or personal, in the Trustee's own name, or in the name of any corporation, partnership or other person as the Trustee nominates for holding the assets, without disclosing the fiduciary relationship.

(f) **Realty.** To buy, sell, borrow upon and enter into leases or contracts concerning real property, with such contracts to be made on any terms and for any period, including a period beyond the duration or termination of the Trust.

(g) **Employ/Delegate.** The Trustee shall be authorized to employ brokers, agents, accountants, real estate experts, attorneys, custodians, investment advisers and to pay such advisers from the Trust as an expense of administration. The Trustee shall be entitled to rely upon advice provided by such advisers without liability for any act done or omission made in good faith, relying upon such advice.

(h) **Securities.** In respect of any securities forming part of any Trust created hereunder, to vote in person or by proxy, discretionary or otherwise; to join in, consent or become a party to, oppose or otherwise participate in any reorganization, readjustment, merger, voting trust, consolidation, exchange, dissolution or other changes affecting any such securities; to deposit any such securities with any committee, depository or trustee and to pay any and all fees, expenses and assessments in connection therewith; to exercise or sell any stock options or any conversion, subscription or other rights and to receive and hold any new securities issued as a result of any such reorganization, retirement, merger, voting trust, consolidation, exchange, or exercise of conversion, subscription or other rights; and generally, to take all action in respect of any such securities as the Trustee could do as absolute owner thereof.

(i) **Renounce Powers.** The Trustee may renounce or otherwise surrender any power granted such Trustee in this Agreement, including a power to make discretionary distributions to any beneficiary. Such renunciation shall apply only to the Trustee making it. The renunciation must be in writing and delivered to each other acting Trustee. When such a renunciation has been made, the power so surrendered shall not be available to any successor to the fiduciary so renouncing. The renunciation shall be effective immediately upon execution by the fiduciary.

(j) **No Power to Adjust Between Income and Principal.** The Grantor expressly waives the application of the terms and conditions of Section 11-2.3(b)(5) of the Estates Powers and Trusts Law of the State of New York to the extent that the provisions of such statute are applicable to this Trust. The Trustee shall not make an adjustment between principal and income pursuant to the provisions of the aforesaid statute or any successor statutes. Further, no court or Administrative agency may compel the Trustee to make an adjustment between income and principal.

(k) **No Election of Unitrust Status.** The Grantor expressly waives the application of the terms and conditions of Section 11-2.4 of the Estates Powers and Trusts Law of the State of New York. The Trustee shall not elect unitrust status for this Trust pursuant to the aforesaid statute to the extent that the provisions of said statute or any successor statute are applicable to this Trust. Further, no court or Administrative agency may compel the Trustee to elect unitrust status for this Trust. The Trustee shall have the sole discretion regarding the investment of Trust assets even if said investment decisions reduce the annual income payable to the Grantor.

## **ARTICLE FIVE TRUSTEES**

**1.     *TRUSTEE AND SUCCESSOR TRUSTEE.***         The Grantor's daughter, **LUCY SMITH**, is hereby appointed as Trustee of this Trust. If **LUCY SMITH** shall die, resign, refuse to serve or cease to act as a Trustee, the Grantor's son, **JAY SMITH** shall serve as substitute or successor Trustee. Each Trustee herein designated shall have the authority to designate a substitute or successor individual or corporate Trustee to act in his or her place in the event that there is no Trustee herein designated available to act as Trustee hereunder. Such designation shall be in writing and acknowledged. In the event there is no Trustee available to act hereunder, a majority of the adult remainder beneficiaries of this Trust shall appoint an individual or corporate Trustee to serve as substitute or successor Trustee. Such appointment shall be made by a written instrument signed and acknowledged by the person making the appointment.

**2.     *REMOVAL OF TRUSTEE.*** The Grantor reserves the right to remove a Trustee upon three (3) days written notice and replace said Trustee with a successor Trustee (other than the Grantor). In the event the Grantor removes but fails to replace the Trustee, then the successor Trustee as provided for herein shall replace the Trustee. No successor Trustee, whether appointed by the Grantor or designated by another, shall have the right to invade principal for the benefit of the Grantor.

**3.     *TRUSTEE LIABILITY.***         The Trustee is authorized to obtain and rely upon the opinion or advice of counsel selected with reasonable care concerning any questions arising under this Agreement.

**4. SUCCESSION.**

(a) Upon acceptance of the Trust by a successor Trustee, title to the Trust property shall vest in the new Trustee without any conveyance or further formality.

(b) Any Trustee may resign at any time by a written instrument duly acknowledged and delivered to the beneficiaries in being.

**5. DISABLED TRUSTEE.** A Trustee who is determined to be disabled shall no longer continue to act as Trustee. A Trustee who has been admitted as a permanent or chronic care resident or patient in a skilled nursing facility, nursing home or other like facility, who is eligible for nursing home placement or who is receiving long-term home health care benefits, shall conclusively be presumed to be disabled and no physician's certification shall be necessary. For the purposes of this Agreement, eligibility for nursing home placement shall be based upon a written evaluation completed by a person or an agency qualified to make such an evaluation.

**6. SINGULAR/PLURAL.** Whenever used in this instrument, the term Trustee shall include the plural of that term as well as the singular.

**7. BOND.** No bond or other security shall be required of any person named herein as Trustee, or by any successor who is designated as provided herein, unless the designation of such successor requires a bond.

**8. ANNUAL ACCOUNTS.** The Trustee shall render an annual account of the administration of the Trust to the Grantor and the then current income beneficiaries, which accounting shall be made as soon as practical after the close of the Trust's taxable year. A sufficient accounting shall be deemed to have been made by the submission to the Grantor and the then current income beneficiaries of a copy of the Federal fiduciary income tax return, if any, filed for the Trust.



If no objection to an account has been made in writing by the party entitled to it within sixty days (60) after the mailing of such account by the Trustee, it shall be deemed approved and shall be conclusive upon all persons interested and their successors in interest.

## **ARTICLE SIX MISCELLANEOUS PROVISIONS**

1. ***NOTICE TO TRUSTEE OF STATUS OF BENEFICIARIES.*** Until the Trustee shall receive written notice of any birth, marriage, death or other event upon which the right to distribution of the income or principal of any Trust may depend, the Trustee shall incur no liability for distributions made in good faith to persons whose interests may have been affected by that event.
2. ***RESTRAINT ON ALIENATION.*** No income or principal payable to or held for any beneficiary, while in the possession of the Trustee, shall be voluntarily or involuntarily alienated, disposed of, or encumbered in any manner other than by the Trustee's action authorized by this Agreement.
3. ***NO APPLICATION OF PRINCIPAL TO INCOME BENEFICIARIES.*** The provisions of Section 7-1.6 of the New York Estates, Powers and Trusts Law, as it may be amended from time to time, or any other statute or rule of law, either now or hereafter in force, purporting to give to any court or other person or agency any power to make an allowance for, or compel the distribution of, either principal or income of an estate or of any trust to any beneficiary otherwise than as expressly set forth herein, shall not apply to the Trust or any Trust estate created by this Agreement, and any such power or powers shall not be exercised with respect to the Trust (irrespective of any consent thereto by any beneficiary).

4. ***RELIANCE BY THIRD PARTIES.*** Third parties may require documentation to verify the existence of this Trust, or particular provisions of it, including the name of the Trustee or the powers held by the Trustee. To protect the confidentiality of this instrument, the Trustee may use an affidavit or a certification of trust that identifies the Trustee and sets forth the authority of the Trustee to transact business on behalf of the Trust instead of providing a copy of this instrument. The affidavit or certification may include pertinent pages from this instrument, including title or signature pages. A third party may rely upon an affidavit or certification of trust that is signed by the Trustee with respect to the representations contained in it. A third party relying upon an affidavit or certification of trust will be exonerated from any liability for actions the third party takes or does not take in reliance upon the representations contained in the affidavit or certification of trust. A third party dealing with the Trustee will not be required to inquire into this Trust's terms or the authority of the Trustee, or to see to the application of funds or other property received by the Trustee. The Trustee's receipt of any money or property paid, transferred, or delivered to the Trustee will be a sufficient discharge to the third party from all liability in connection with its application. A written statement by the Trustee is conclusive evidence of the Trustee's authority. Third parties are not liable for any loss resulting from their reliance on a written statement by the Trustee asserting the Trustee's authority or seeking to effect a transfer of property to or from the Trust.

5. ***SITUS OF TRUST.***

(a) The Grantor is currently a resident of the State of New York, and all questions pertaining to the validity, construction, effect and administration of this Agreement shall be determined by and in accordance with the laws of the State of New York.

(b) The situs of the property of any trust created hereunder may be maintained in any jurisdiction, in the absolute discretion of the Trustee, and thereafter transferred at any time to any other jurisdiction selected by the Trustee. Upon any such transfer of situs, the Trust Estate may thereafter, at the election of the Trustee of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee of any trust created hereunder elects to change the situs of any such trust, the Trustee shall hereby be relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

6. ***UNENFORCEABLE PROVISIONS.*** Any provision of this Agreement which may prove unenforceable under any law shall not affect any other provision of this Agreement, all of which shall remain in full force and effect.

7. ***COMMENCEMENT OF TRUST.*** This Agreement shall become effective upon the execution of one (1) or more duplicate originals by the Grantor and the Trustee.

8. ***LIMITATION ON DURATION OF TRUSTS.*** Notwithstanding anything herein to the contrary, if not sooner terminated and distributed as hereinabove provided, the Trusts hereby created shall, in any event, terminate twenty-one (21) years after the death of the last survivor of the Grantor's descendants now in being. Upon such termination, the Trustee shall distribute to each income-beneficiary hereunder the principal of his or her share of the Trust Estate.

9. ***HEADINGS.*** The headings and subheadings used throughout this Agreement are for convenience only and have no significance in the interpretation of the body of this Agreement.

10. **ACCEPTANCE.** The Trustee hereby accepts the Trust created by this Agreement.

11. **BINDING EFFECT.** This Agreement shall be binding upon the executors, administrators and successors of the parties hereto.

12. **SERVICE OF PROCESS ON PERSON UNDER DISABILITY.** The Grantor directs that in any proceeding relating to any trust created under this Trust Agreement service of process upon any person under a disability shall not be made when a person not under a disability is a party to the proceeding and has the same interest as the person under the disability.

13. **CONTINUATION OF POWER UPON TERMINATION.** The title, powers, duties, immunities and discretion herein conferred upon the Trustee shall continue after termination of the Trust and until final distribution.

IN WITNESS WHEREOF, Grantor has executed this Agreement, and the Trustee, to evidence his acceptance of this Agreement, has executed the same, as of the day and year first above written.

**WITNESSES:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
ANNE SMITH, Grantor

\_\_\_\_\_  
LUCY SMITH, Trustee

**Acknowledgment taken in New York State**

State of New York, County of Suffolk, ss:

On the \_\_\_\_ day of June, in the year 2018, before me, the undersigned, personally appeared

**ANNE SMITH**

personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she has executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

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Notary Public

**Acknowledgment taken in New York State**

State of New York, County of Suffolk, ss:

On the \_\_\_\_ day of June, in the year 2018, before me, the undersigned, personally appeared

**LUCY SMITH**

personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she has executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

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Notary Public

THE ANNE SMITH ASSET MANAGEMENT TRUST

SCHEDULE "A"

**Trust in Time Series:  
MEDICAID ASSET PROTECTION TRUSTS**

**June 19, 2018**

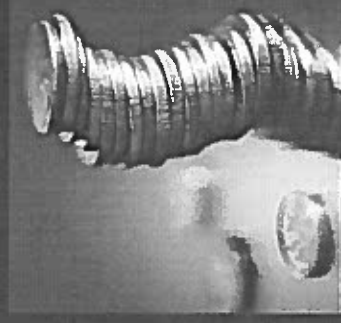
**Richard A. Weinblatt, Esq.**

- The Irrevocable Income Only Trust is a valuable tool for Medicaid Planners.
  - Allows Grantor to receive Medicaid benefits after the look-back/penalty period.
  - Provides a continued source of income for the Grantor
  - Protects the principal of the trust for the Grantor's intended beneficiaries.
- Issues to consider.
  - Income taxes
  - Gift taxes
  - Estate taxes



# Medicaid Eligibility Rules

- Income.
  - For 2018, an individual applicant is allowed \$842 per month of income. Income in excess of this amount must be spent down on medical care before the individual is eligible to receive Medicaid benefits.
  - The community spouse of a nursing home resident or long-term home health care recipient is allowed \$3,090.50 per month.



# Medicaid Eligibility Rules

- Resources.
  - Effective 1/1/2018, an individual applicant is allowed \$15,150 of resources. In addition the applicant may have a burial fund in the amount of \$1,500 and an irrevocable pre-needed funeral assignment in any reasonable amount.
  - The community spouse of a nursing home resident or long-term home health care recipient is permitted a resource allowance of \$74,820, or  $\frac{1}{2}$  of the couple's resources up to a maximum of \$123,600.

# Transfer of Assets Rules

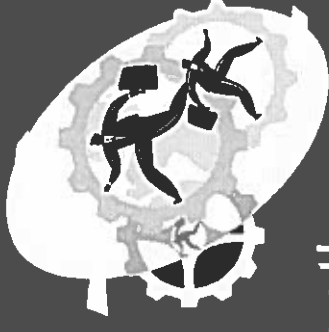
- For transfers made on or after 2/8/06.
  - Look-back period.
    - The look-back period is 5 years for all transfers of assets made on or after February 8, 2006.

# Transfer of Assets

## Rules

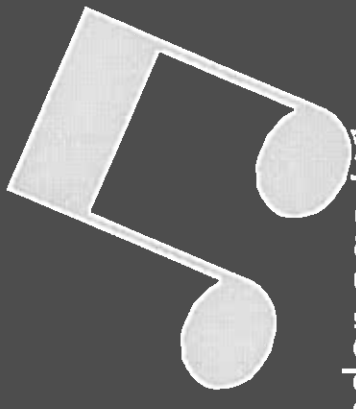
- The penalty period does not apply to “community Medicaid” or to community-based waiver programs like the “managed long-term home health care program” (“MLTC”).
  - The penalty only applies to persons applying for nursing home care services.
- Method of calculation.
  - Transfer divided by Medicaid regional rate = penalty period.
  - The current regional rate for Nassau/Suffolk is \$13,053

# Transfer of Assets Rules



- Penalty period starts on the first day of the month after the transfer OR the date the institutionalized individual is otherwise eligible for AND receiving nursing facility services, whichever is later.
- Thus, the elements for the start of the penalty period are:
  - Applicant is receiving nursing facility services. AND
  - Applicant is otherwise eligible (except for the penalized transfer).
    - Resources at or below \$15,150
    - Income below the private pay rate for nursing home

# Transfer of Assets Rules



- Exempt transfer of Homestead.
  - To spouse, blind or disabled child, or child under age 21.
  - To sibling with an equity interest who has been residing in the home for 1 year immediately prior to institutionalization.
  - To caregivers child who resided in the home for 2 year period immediately prior to institutionalization.
- Other exempt transfer of assets.
  - To spouse or blind or disabled child.
  - To authorized SNT.
  - Transfer made for a purpose exclusively other than to qualify for Medicaid.

# Outright Transfers

## Give it All to the Kids

- Advantages
  - Simple to make
  - May not require the services of an attorney
- Disadvantages
  - Loss of income
  - Loss of control
  - Dependence on kids
  - Gift tax issues
  - Income tax - who pays it?
  - Exposure of assets to childrens' problems
    - Creditors
    - Accident
    - Divorce



# Transfer to Income Only Trust

- Advantages
  - Grantor retains the income generated by the assets transferred
  - Income and principal are protected from the children's problems during the grantor's lifetime
  - Step up in basis - avoid capital gains
  - Bells and whistles can be added to the basic trust
    - Keep gift incomplete
    - Avoid capital gains on sale of residence
    - Retain control over the children



# Transfer to Income Only Trust

- Disadvantages
  - Loss of income if nursing home care is required
  - May require nursing home care before the expiration of the 5 year look-back period

# The Basic Income Only Trust

- Terms of the Basic Trust
  - Income payable to grantor for life. (may also provide a certain amount of principal payment to grantor)
  - Upon grantor's death, principal is paid to children or other designated beneficiaries
  - The power of a court to invade principal for benefit of grantor is prohibited. EPTL § 7-1.6

# The Basic Income Only Trust

- Treatment of the Basic Trust by Medicaid
  - Transfer funding the trust is subject to penalty. The look back period is 60 months.
  - Grantor's income includes trust income (plus principal payments, if permitted) paid to the grantor.
  - Grantor's resources include trust income and principal, if any, available to the grantor but not paid.
  - If there are any circumstances under which any payment to grantor can be made, then that portion of the principal or the income from which any payment could be made is deemed available to grantor. This is true no matter how remote the possibility.

# The Basic Income Only Trust

- Tax Treatment of the Basic Trust
  - Income taxed to the grantor
  - Capital gains taxed to the trust
  - Funding the trust is a completed gift subject to gift taxes
  - Trust included in grantor's estate. Step up in basis

# Additional Trust Provisions (Bells and Whistles)

- Trustee's Powers
  - Sprinkle income
  - Invasion of principal for Grantor
    - Available resource to grantor to extent invasion is permitted.
  - Invasion of principal for others (children)
    - Provides flexibility if funds are needed for medical care or supplemental needs while grantor is receiving Medicaid benefits.
    - Payments should not result in additional penalty period, since the transfer funding the trust was penalized.



# Additional Trust Provisions (Bells and Whistles)

- Special Power of Appointment
  - Power retained by the grantor over income and/or principal to change the disposition set forth in the trust.
    - Cannot be exercised in favor of the grantor, his creditors, his estate, or estate creditors (otherwise it would be a general power of appointment and the entire trust would be available).
- Purposes for reserving a special power of appointment
  - Keeps gift incomplete
  - Control over beneficiaries. Keep kids in line
  - Invoke the grantor trust rules over principal
    - Can be important in context of the 121 exclusion for a primary residence
- Keep trust revocable under EPTL § 7-1.9
  - Name only adult competent beneficiaries in trust and keep power to change beneficiaries
  - EPTL § 7-1.9 permits grantor and all interested beneficiaries to revoke the irrevocable trust

# Additional Trust Provisions (Bells and Whistles)

- Grantor Trust Rules - IRC § 671-677
  - If grantor trust rules apply, the trust is taxed as being owned by the grantor and not by the trust.
  - Benefit of invoking the grantor trust rules
    - Individual rates are lower than the more compressed trust rates.
      - But the right to income already gives the grantor this benefit.
    - Taxing the grantor instead of the trust on capital gains allows for the 121 exclusion on the sale by the trust of the grantor's primary residence.

# Additional Trust Provisions (Bells and Whistles)

- How to invoke the grantor trust rules
  - Section 677
    - Grantor is treated as owner of any portion of a trust over which he may receive the income. This is our typical income only trust.
      - This power, however, does not give grantor trust status over corpus, which is needed for the 121 exclusion.



# Additional Trust Provisions (Bells and Whistles)

- Section 674
  - Special power of appointment (discussed above).
    - Lifetime special power of appointment over principal causes capital gains to be taxed to grantor. 674(a).
  - Testamentary power of appointment over principal may cause capital gains to be taxed to the grantor if they are accumulated and added to principal. 674(b).

# Additional Trust Provisions

## (Bells and Whistles)

- Section 675(4)(c)
  - Grantor is treated as the owner of any portion of a trust in respect of which the grantor or another person has a power, in a non-fiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to reacquire the trust corpus by substituting other property of an equivalent value.
  - While this power should cause capital gains to be taxed to the grantor, it does not independently cause estate inclusion required for a step up in basis. But the retained income will.

# Additional Trust Provisions (Bells and Whistles)

- Section 675(4)(c)
  - Caution for Florida Medicaid
    - Fair hearing decisions in Florida have held that the substitution power makes the trust an available resource.
    - Florida attorneys do not use the substitution power, but instead use a combination of a special testamentary power of appointment reserved by the grantor, as well as the appointment of a trust protector with the power to add charitable beneficiaries.

# Primary Residence

- The most common asset people try to protect is their primary residence.
- The IRC Section 121 exclusion from capital gain is a major consideration in transferring the primary residence.
- Another major consideration in transferring the primary residence is the avoidance of estate recovery by Medicaid.

# Primary Residence

- Section 121 exclusion - post 5/6/97.
  - Taxpayer may exclude \$250,000 of capital gain (\$500,000 for a married couple) on sale of primary residence.
- Requirements
  - Taxpayer must own and occupy the residence as a primary residence for 2 out of the last 5 years immediately preceding the sale.
  - Ownership and use need not be during the same periods.
  - Can use exclusions once every 2 years.
- If trust owns the residence, the grantor trust rules over both income and corpus must be invoked in order to qualify for the exclusion.

# Primary Residence

- Options to protect the Primary Residence
  - Transfer residence to exempt person
    - child under age 21.
    - blind or disabled child.
    - sibling with equity interest who resided in home as primary residence for at least 1 year immediately prior to date individual becomes institutionalized.
  - Adult child who resided in home as primary residence for 2 years immediately prior to parent's institutionalization and was the parent's care giver.
  - But be aware of carryover basis

# Primary Residence

- Sell residence
  - Use part gift part loan for sales proceeds
- Outright gift of residence to non-exempt individuals
  - Advantages
    - Simple
  - Disadvantages
    - Carryover basis
    - Gift tax
    - No legal right for grantor to reside in home



# Primary Residence

- Deed transfer with retained life estate
  - Advantages
    - Grantor retains legal right to reside in residence.
    - Step up in basis at death.
    - May be able to keep gift incomplete by reserving a special power of appointment in the deed (But possible title problems).
    - Retain property tax exemptions.
    - Reduced Medicaid transfer penalty period. Medicaid considers the transfer of only the remainder interest.



# Primary Residence

- Disadvantages
  - Value of life estate returned to grantor if property is sold.
  - Capital gain on portion representing the remainder interest not eligible for 121 exclusion.

# Primary Residence

- Transfer to Trust
  - Advantages
    - Retain grantor's right to reside in the home.
    - Step up in basis at death.
    - May retain property tax exemptions.
    - May be able to keep gift incomplete by reserving a special power of appointment.
    - May be able to qualify the entire capital gain on sale for 121 exclusion.
    - No reversion of the remainder interest to grantor if property is sold.
  - Disadvantages
    - No discounted value of transfer (But may consider transfer to trust with retained life estate in deed).

# Creation of the Trust

- Execution of the Trust.
  - Trust must be in writing, and executed and acknowledged by the grantor in the same manner as required for the conveyance of realty.
- Funding.
  - Effective December 25, 1997, a transfer to a lifetime trust is not accomplished by merely reciting in the trust that the grantor is assigning all of the property listed in Schedule A.
  - For trusts where the grantor is the sole trustee, the transfer of assets capable of registration, such as real estate, stocks and bonds, requires that these assets be registered to the trust.
  - It is not clear from the statute whether or not registration is required for lifetime trusts where the grantor is not the sole trustee. If such registration is not required the transfer must comply with existing case law. The case law mandates that the grantor have an intent to make the gift to the trust and that the assets were delivered to the trustee. It is recommended, however, that even where the grantor is not the sole trustee, registration should be made in the same manner as if the grantor were the sole trustee.