

# SPAIN, SPAIN & VARNET P.C.

ATTORNEYS AT LAW

SUITE 2220

33 NORTH DEARBORN STREET  
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 220-9112

FACSIMILE (312) 220-9261

[www.ssvlegal.com](http://www.ssvlegal.com)

## **OBRA '93: CHANGES IN MEDICAID TRANSFER OF ASSET RULES**

Medicaid is the government program that pays for, among other things, long-term care for the elderly and the disabled. For millions of people who are disabled and poor, Medicaid pays for acute health care, dental care, respite services, rehabilitation therapies, assistive technology devices, and other community-based services and supports.

OBRA '93, which was signed into law on August 10, 1993 by President Clinton, renders significant changes to the eligibility rules at Part II of the legislation (all amendments are to 42 U.S.C. § 1396 et seq.). The new Medicaid rules were designed to restrict elderly persons from rearranging their finances in order to qualify for Medicaid to pay for their long-term nursing home care. For the most part, the new law limits the ability of elders to transfer their assets to their adult children or to trusts known as "Medicaid Qualifying Trusts" in order to qualify for Medicaid. However, there are two major exceptions to the new transfer-of-asset rules that have a tremendous impact on the lives of persons with disabilities. These changes are positive changes and expand our ability to help persons with disabilities to preserve their assets and still qualify (or remain qualified) for Medicaid.

First, however, the bad news: OBRA '93 increased the periods after a transfer of assets during which the individual will be ineligible for Medicaid. This so-called "look back" period has been extended to sixty (60) months for transfers to both individuals and to irrevocable trusts, which largely eliminates the ability of most families to use gifting or trust arrangements to protect assets.

Another piece of bad news is that the new law eliminated a person's ability to disclaim an inheritance. If a person with a disability was in line to receive an inheritance, and if the receipt of this inheritance would jeopardize his or her eligibility for government benefits, prior to OBRA '93, he or she could simply disclaim the inheritance. OBRA '93, however, treats disclaimers as a transfer of an asset and a person will lose his or her eligibility for Medicaid if he or she disclaims an inheritance.

Now for the good news: OBRA '93 created two exceptions to the transfer-of-asset rules [see 42 U.S.C. § 1396p(d)(4).], which expanded an attorney's ability to help persons with disabilities, and their families, remain qualified for Medicaid, despite having excess assets in their name.

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First, a person going into a nursing home, who otherwise would not qualify for Medicaid because of the value of his or her own assets, can qualify for Medicaid payment of his or her nursing home care by transferring assets to an irrevocable “OBRA ’93” special needs trust for the benefit of a person with a disability. In addition, Illinois law currently allows a parent to transfer his or her own funds into a third-party supplemental needs trust for a beneficiary with a disability under the age of 65. Unlike other transfers of assets, there is no “look back” period for these transfers. The individual with a disability who is the beneficiary of the trust must be under the age of sixty-five (65) and must be disabled as defined by Social Security regulations.

Second, if a person with disabilities, under the age of sixty-five, has money in his or her own name (for example, because of a lawsuit settlement, direct inheritance, savings, or gift), the parent, grandparent or guardian of the disabled person can create a special needs irrevocable trust and arrange for the transfer of the individual’s assets to the trust. If the grandparents and parents are deceased and the individual with disabilities does not have a guardian, the individual can petition the court to create an OBRA ’93 special needs trust. Once the funds of the disabled person have been transferred to the trust, he or she will be immediately eligible for Medicaid. Depending upon the source of the funds used to fund an OBRA ’93 there may be a requirement for a payback clause. That means, in some cases, the state will be paid back for services provided to the disabled beneficiary after the death of the beneficiaries.

PLEASE NOTE: These trusts do not replace the need for families with a disabled individual to write an estate plan that enables a disabled family member to benefit from an inheritance and remain qualified for government benefits. Families still need to incorporate a special needs trust into their estate plan if they have a family member with a disability. With proper planning, parents can leave the remaining trust estate to other family members when the disabled beneficiary dies. There is no “pay back” requirement in a traditional special needs trust.

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