THE COLLISION OF LONG TERM CARE AND ESTATE PLANNING: TRAPS TO AVOID, TIPS TO EMPLOY

By Jennifer L. Coulter

As your happy clients leave your office with their new estate plans, make careful note of their catastrophic life events. While we all ask our prospective estate planning clients about the size of their estates to ensure that estate taxation issues are handled, very few consider the potential ramifications of paying for Long Term Care when doing estate planning. Only 0.14 percent of estates will be subject to estate taxes under the American Taxpayer Relief Act of 2012.[1] However, some 70% of Americans over 65 are expected to need Long Term Care and 43% of Americans over 65 are anticipated to require a stay in a skilled nursing facility.[2] Long-term Care Medicaid benefits pay for two-thirds of long-term care residence in nursing facilities.[3] The question then is how do we plan for this demographic?

I.

Spousal Testamentary Trusts:

Protecting Resources for the Surviving Spouse

Most people think of Long Term Care Medicaid as a program for the poor because it has a $2,000 resource limitation for a single person.

1 Center on Budget and Policy Priorities 2014 Report cbpp.org

2 Longtermcare.gov

3 *http://www.hhsc.state.tx.us/medicaid/index.shtml*

However, with good estate planning, it is often possible to protect a great deal more for a single person. A tragic truth of this area of law is that widowhood is a common occurrence. Some 40% of women over 65 and 13% of men over 65 were widowed in 2010, and the numbers skyrocketed to 73% for women and 35% of men by age 85.[7]

The problem is increased when one of the spouses dies and leaves his or her ownership interest outright to the surviving spouse, as so many spouses do. At that point, the surviving spouse owns all of the community and separate property of the deceased spouse, often leading the survivor to be over the $2,000 resource limitation.

When making an application for Long Term Care Medicaid benefits, any resources owned by or accessible to either spouse are resources that could be counted toward the total resource limitation of the spouse making application for benefits.[8]

In the initial application, the Texas Health and Human Services Commission ("HHSC") makes no distinction between community property and separate property; the primary test as to whether or not to include an item is if either spouse owns or has access to the item.[9]

Even an inter vivos transfer to a trust, whether revocable or irrevocable, may not exclude the transferred resources for the spouse needing benefits if either spouse is the Trustee of the trust and has the legal right to use the trust for his or her benefit.[10]

For individuals over

[5] Medicaid for the Elderly and People With Disabilities Handbook § F-1300

[6] TAC § 358.348

[7] *http://www.agingstats.gov/Main_Site/Data/2012_Documents/Population.aspx*

[8] 42 USC § 1396r-5; Medicaid for the Elderly and People With Disabilities Handbook § J-2200

[9] Medicaid for the Elderly and People With Disabilities Handbook § J-2200

65, transfers to irrevocable self-settled Special Needs Trusts trigger transfer penalties which can disqualify the individual from receipt of benefits for years.
[13] See Medicaid for the Elderly and People With Disabilities Handbook § F-6500
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There is a solution to this dilemma though. By creating a trust in the will of each spouse, it is possible to prevent the resources transferred to the survivor from being countable. It is essential to note that the trust itself must be created by the will. A pour-over will into an inter vivos trust created previously and nominally funded will not prevent the resources from counting towards the survivor's resource limitation if they would in any other way be counted.

A testamentary Medicaid trust should not appoint the survivor as Trustee of the trust and must allow absolute discretion in the Trustee for all distributions from the trust.[12] Although "supplement but not supplant" language is often used in these types of trusts, it is not necessary for Texas Medicaid benefits and can unnecessarily restrict the ability of the Trustee to make distributions to or on behalf of the beneficiary. A simple support trust with sole discretion in the Trustee is sufficient at this time.[13] However, the careful planner, knowing that people may move into other jurisdictions and that statutes and regulations change over time, can provide for the broadest language possible with a type of savings clause restricting distributions from the trust if the inclusion of the broader support language itself causes disqualification from benefits. The language may (though it need not) appear as follows in the Will of the spouses:

> To my son, as Trustee of the Medicaid Testamentary Trust for the benefit of my wife created herein. The Trustee shall have the sole, absolute and unfettered discretion to make distributions to or on behalf of my wife for her support. However, if the mere existence of the previous

[11] Medicaid for the Elderly and People With Disabilities Handbook § F-6300; Medicaid for the Elderly and People With Disabilities Handbook F-6500

[12] See Medicaid for the Elderly and People With Disabilities Handbook § E-3312

power causes disqualification for any governmental benefits or assistance program to which my wife might otherwise be entitled, the previous sentence shall have no affect and the Trustee shall have only the power to make such distributions as will not cause disqualification.

Once the wills creating the Medicaid Testamentary Trust are in place, it is essential to ensure that the planning is completed on the practical level. Many good estate plans are undone by virtue of clients engaging in accidental or inadvertent estate planning. The planner must also ensure, in this case, that the assets of both parties pass to the estate or to the trust created in the will and not by some alternate non-probate distribution scheme outright to the surviving spouse. This is common where there are retirement plans, life insurance policies, or joint bank accounts, on which many people simply name their spouse as beneficiary when they initially complete the forms and which are never later reviewed. Without this step on the part of the good estate planner, it is possible for the trust to contain nothing but the already exempt homestead and for the rest to pass unprotected to the surviving spouse by beneficiary designations and right of survivorship agreements.

Another step to consider in planning for the death of one spouse is partition of community property into separate property pursuant to Texas Family Code § 4.102. While Medicaid does not consider the separate property character of assets when determining initial Medicaid eligibility,[14] only assets which pass pursuant to the Will into the Testamentary trust will be excluded. If all assets of the couple are community property, only half may be protected upon the death of the first spouse to die. Where we have a seriously ill spouse likely to predecease a relatively healthy spouse or a spouse already on Medicaid and a spouse at home where the assets must be transferred out of the name of the Medicaid spouse within the first year of eligibility,[15] an agreement

15 Medicaid for the Elderly and People With Disabilities Handbook § I-8000 [illegible] the community property and a gift of the Medicaid spouse's interest [illegible] can ensure that the maximum community property is protected from Medicaid to the survivor.

14 Medicaid for the Elderly and People With Disabilities Handbook § J-2200

Protecting these resources in a Medicaid Testamentary trust can allow the surviving spouse to stretch the life of the assets by permitting her to receive Medicaid benefits to offset the cost of long term care, either at a nursing facility or in home, while avoiding many of the problems associated with a single person's receipt of benefits in a means-tested program. Many single individuals who receive benefits in a skilled nursing facility have difficulty maintaining their exempt homesteads. With only $2,000 in countable resources and nearly all monthly income going to the facility, paying for homeowner's insurance, property taxes, and routine maintenance can be problematic unless the individual qualifies for the home maintenance diversion,[16] which is not common. Additionally, many Medicaid recipients have personal needs expenses that exceed the $60 allowance presently allowed under Medicaid rules.[17] They may need care above and beyond the care Medicaid can provide, especially if the individual remains at home where Medicaid cannot provide 24-hour a day care, or where their medical needs run to items such as dental care that are not otherwise covered by such Long Term Care Medicaid services. All of these expenses can, with care, be paid out of the trust resources without disqualifying the Medicaid recipient from benefits.[18]

[16] Medicaid for the Elderly and People With Disabilities Handbook § H-1700

[17] Texas Human Resources Code Section 32.024 (W); Medicaid for the Elderly and People With Disabilities Handbook § H-1500.

[18] See Medicaid for the Elderly and People With Disabilities Handbook § F-6610 for treatment of distributions from a trust in determining income eligibility; and Medicaid for the Elderly and People With Disabilities Handbook § E-3312

II.

Third Party Settled Special Needs Trusts: Keeping resources in the family without disqualifying individuals for Medicaid

We have all seen wills that write out beneficiaries because the individuals are disabled and receipt of a bequest could cause disqualification from governmental benefits. Worse, many of us have seen such disqualification resulting from a well intentioned bequest to a disabled individual. This result can always be avoided. Any third person (any person who is not the disabled individual receiving or anticipating receipt of governmental benefits) can establish a Third-party Settled Special Needs Trust for the benefit of the disabled beneficiary. These trusts allow the disabled individual to receive gifts or inheritances that can provide for their support without disqualifying them from the receipt of means-tested benefits programs. These types of Third-party Settled Special Needs Trusts are common-law creations and will not be includable for Medicaid purposes so long as the disabled individual is not the Trustee and distributions are discretionary in the Trustee.[19] The key for Third-party Settled Special Needs Trusts is the amount of control the beneficiary exercises. Unless the disabled individual is the spouse of the person making the gift or bequest, as discussed above, these trusts can be either inter vivos or testamentary.[20]

The benefits of a Third-party Settled Special Needs Trust as compared to a Self-settled or First-party Settled Special Needs Trust are staggering. These Self-settled Special Needs Trusts are commonly called d4a trusts because of their enabling legislation in 42 USC § 1396 (P)(d)(4)(a). First, and often of greatest import, there is no need for a Medicaid pay-back provision as there is with a Self-settled Special Needs Trust.[21]

Medicaid must be the first named beneficiary of a Self-settled Special Needs Trust until

[19] Medicaid for the Elderly and People With Disabilities Handbook § F-6100; Medicaid for the Elderly and People With Disabilities Handbook § E-3312

[20] *See Id.*

they have been repaid dollar for dollar for benefits provided to the individual.
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Second, the trust may be drafted with the same broad language for support that the Medicaid Testamentary Trust for the spouse includes. This provides much greater flexibility in making distributions to or for the benefit of the disabled individual than can be accomplished with a Self-settled Special Needs Trust, especially where recent interpretations have been causing inclusion for many more distributions than in the past.[23] It is important to note that "supplement but not supplant" language is not a requirement, although the same savings clause language may be employed to ensure compliance with all interpretations in this case as in the case of the Testamentary Medicaid Trust for the benefit of a surviving spouse.

Third, though a corporate fiduciary can be advisable in some circumstances, it is not required for a Third-party Settled Special Needs Trust. The only requirement regarding the Trustee is that he or she not be the disabled beneficiary.[24]

There is also no

[22] *See Id.*

[23] POMS Update by Nancy Sosa presented at the 10th Annual Changes in Trends Affecting Special Needs Trusts by University of Texas School of Law. (February 6, 2014).

[24] Medicaid for the Elderly and People With Disabilities Handbook § F-6500.

[27] *Id.*

requirement to look for an appropriate person to establish the trust as there is with a d4a Trust. Self-settled Special Needs Trusts cannot, despite their name, be established by the disabled individual him or herself.

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Fourth, Self-settled Special Needs Trusts are not available to everyone as a means of protecting resources from countability. Self-settled Special Needs Trusts are only available to individuals who are under sixty-five at the time of the establishment of the trust.[27] This is an especially important consideration in future distributions, as in a will. A person who may be able to benefit from a Self-settled Special Needs Trust at the time of the drafting of the will may have aged out of that ability by the date of the distribution actually requiring the creation of such a trust. In that circumstance, the disabled individual would be left to find other avenues for continuing to receive benefits.

Third-party Settled Special Needs Trusts are common-law creations, not statutory ones, as Self-settled Special Needs Trusts are. There is no specific language or form to be used. However, there are common drafting considerations and techniques to employ to ensure that the trust will be an excluded resource. Keeping these in mind can assist a careful practitioner in creating Special Needs Trusts that can be flexible enough to meet changing circumstances while ensuring maximum protection from countability.

[25] 42 USC § 1396 (P)(d)(4)(a). There is legislation pending to correct this problem, but it has not yet been passed.

[26] *Id.*

The first consideration is the source from which the funding of the trust is derived. No part of the assets held in a Third-party Settled Special Needs Trust can belong to the disabled individual. Any contribution to the trust by the disabled individual is sufficient to convert the trust from a Third-party Settled to a Self-settled Special Needs Trust with all the complications that entails. If the individual adding those resources is over sixty-five and unable to benefit from a Self-settled Special Needs Trust, transfers to such trust may result in either inclusion of the corpus of the trust or in a transfer penalty for the transfer to the trust.[28] It is useful then, when drafting and funding the trust to ensure the actual ownership of the resources and to specifically prohibit the Trustee from accepting any funds belonging to the disabled individual, whether offered by the disabled individual him or herself or by another on behalf of the disabled individual.

[28] Medicaid for the Elderly and People With Disabilities Handbook § F-6500.

[29] *Id.*

The trust must also be discretionary, with sole discretion as to all distributions in the Trustee. The disabled individual should not be able to demand or compel distributions. There is some argument to be made that, even where the distribution standard is "sole, absolute and unfettered discretion of the Trustee" that the beneficiary can bring an action in court to enforce some distribution. However, this simple ability, unlike the ability to compel distributions where the Trustee "shall make distributions", is disregarded for the purposes of determining the countable nature of the trust. In a discretionary trust, the disabled beneficiary does not have sufficient control over the trust estate to trigger countability.[29]

The disabled beneficiary should not be the Trustee and should not have the ability to be named Trustee while he or she is still a disabled individual receiving or anticipating receipt of governmental benefits. The same reasoning applies as to why the disabled beneficiary cannot be allowed to compel distributions, though more forcefully here; as Trustee, the disabled individual would exercise enough control over the trust estate to

make it a countable resource. Provision may be made for naming the disabled beneficiary as Trustee in the event that he or she is no longer disabled and receiving or anticipating receipt of governmental benefits.

Finally, while it is not a requirement, it is often helpful to state the purpose of the trust and provide a non-exhaustive list of permissible distributions as guidance. This statement of purpose can be broad, such as:

> The purpose of the John Doe Special Needs Trust is to provide for the support of John Doe as liberally as will not disqualify him from receipt of any governmental benefits or assistance program to which he might be entitled, unless the Trustee of this trust and John Doe determine that such disqualification is in John Doe's best interests. Distributions to or for the benefit of John Doe to meet such purpose may include, but are not limited to, housing, food, travel, clothing, educational expenses, travel expenses, and otherwise not covered medical expenses.

This expression of purpose should include a savings clause to limit or entirely nullify the ability to disqualify the disabled individual if the existence of the power is sufficient to cause the disqualification.

III.

Contingent Trusts: Planning for Unanticipated Disability

Many estate planning clients do not have these concerns. Their children and spouses are healthy. Frequently then, it may seem excessive and unnecessarily restrictive to create trusts for their beneficiaries, especially if the beneficiaries are not to be the Trustees of those trusts. Many people will want to give the gift outright. However, most probate attorneys can give story after story of beneficiaries whose health or situation altered before the death of the individual creating the will. This is where contingent trusts can be life-saving (and asset protecting) tools.

A will or a trust can and should contain contingent trusts for the benefit of any beneficiary who, at the time of distribution, meets any number of criteria. Minor beneficiaries, for example, are perfect for contingent trusts, which come into being only if the beneficiary is under the age of majority (or 21 or 25, depending on client preference) at the time of distribution. The same may be said of people who are under the protection of the bankruptcy courts. Why not also plan for unexpected disability?

Each will and trust may contain a trust that will come into existence only if the beneficiary is:

1) disabled and receiving or anticipating receipt of governmental benefits which outright distribution would disqualify the beneficiary from receiving; or

2) a person whose resources are deemed to a person who is receiving or anticipating receipt of governmental benefits which outright distribution would disqualify the person to whom the beneficiary's resources are deemed from receiving.

These contingent trusts can use the same language as a traditional Third-party Settled Special Needs Trust, including the broad grants of power and the same savings clauses to limit those broad grants of power if their existence is sufficient to cause disqualification.

The provisions creating the contingent trusts should also include limitations on the ability to be named executor or Trustee to anyone who is prohibited from outright distribution on the basis of a disability triggering the creation of such a trust.

IV.

The Homestead in Trust: How Not to Convert an Exempt Asset Into a Countable Resource

One of the common Medicaid traps that attorneys who plan for Medicaid benefits often see is the homestead in a revocable living trust. A homestead owned outright by a Medicaid applicant who has the intent to return home (even if that intent is not medically probable) is an exempt resource.[30] As a result, the homestead is one of the assets most easily protected from Medicaid countability. However, transfer of that homestead into a revocable living trust converts it from what is for most people the single largest exempt resource into a resource that is countable for its entire equity value.[31]

[30] Medicaid for the Elderly and People With Disabilities Handbook § F-3000; F-3120.

[31] Medicaid for the Elderly and People With Disabilities Handbook § F-3200; F-3210.

[32] TAC § 358.321; Medicaid for the Elderly and People With Disabilities Handbook § F-1100.

[33] Medicaid for the Elderly and People With Disabilities Handbook § I-5700.

[34] Medicaid for the Elderly and People With Disabilities Handbook § A-4300.

This problem can generally be overcome. The Grantor, or the Grantor's representative if the individual who transferred the home into the trust has lost capacity, can simply transfer the home back out of the trust and into the name of the individual needing benefits. The problem with that as a solution is that it is triage for a hemorrhage rather than a preventative measure. Medicaid determines eligibility for each calendar month by determining countable resources as of 12:01 AM on the first day of that calendar month, or, for practical purposes, as of close of business the last day of the prior calendar month.[32] Frequently, by the time a person becomes aware of the problem (often after a denial for benefits) and corrects it, damage has been done. HHSC will allow the return of a previously transferred asset to wipe out the transfer.[33] Unfortunately though, HHSC can only look back three calendar months from the calendar month of application for eligibility.[34]

If Mom transfers her home into a revocable living trust in January and enters a skilled nursing facility after a fall in February, she is unlikely to make application until at

le Medicaid for the Elderly and People With Disabilities Handbook § B-6400
least March. This is for two reasons: Mom needs to be under continuous care in the nursing facility for 30 days before the application could be certified;
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HHSC has 45 days to respond,[36] which puts the denial into April or May, depending on the actual pending date. That response can sometimes be a notice of delay in making the determination. By the time Mom understands that she has a potentially fixable problem, which the denial letter does not tell her, and comes to an attorney to have the problem fixed, even if the deed is drafted immediately, it is likely to be June before application is made again. An application submitted in June can only ever get eligibility back to March 1.

This is a best case scenario in which few rights are lost because everything was done timely from the filing of the initial application, to the determination, to the correction of the problem, and the reapplication. Where time lapses in any of those steps, or where mom never comes to understand that the problem is correctable, thousands of dollars that would not otherwise have been spent may be produced from the pockets of the children to pay for mom's care, or, worse, mom may return home unsafely because she cannot afford to pay privately for care.

If the client's desire for a revocable living trust is primarily motivated by the desire to avoid probate, there are other solutions that can accomplish the goal without converting an exempt resource into a countable one. This can include drafting and nominally funding the revocable living trust, then using a Lady Bird Deed or Enhanced Life Estate Deed (discussed below) to transfer the home into the trust automatically upon the passing of the Grantor of the trust. It is important not to use a traditional life estate

[35] See Medicaid for the Elderly and People With Disabilities Handbook § B-3400

deed to make this transfer where Medicaid considerations may be a factor, as discussed below.

V.

Family Farms, Ranches, and Mineral Interests: The Problem of Ongoing Businesses and Medicaid

[36] Medicaid for the Elderly and People With Disabilities Handbook § F-3000

Treatment of farms, ranches, and mineral interests is complicated with regard to Medicaid, involving several factors that ought to be considered when planning around these assets. First, generally, all real and personal property available to an applicant is considered a countable resource to the applicant unless it falls into an exception. Co-owned personal property may be considered to be non-countable by virtue of the difficulty of sale without consent of the co-owner, but co-owned real property is generally considered available to the owner to the full extent of his or her ownership interest, as, at least in theory, any owner can sell his or her ownership interest without consent of the other owners.[37] It is important, then, when having an eye on either present eligibility or future planning, to know the exemptions likely to apply.

First, for farming and/or ranching land and mineral interests related to the homestead, there is an exemption.[38]

All land adjacent to the homestead land, even if separated by roads or streams, if acquired at varying times, and if described in separate legal instruments, whether there is a business operated on it or not, is excluded as part of the homestead.[39]

The same is true of the mineral interest if it is for the minerals found under the surface interest on which the homestead lies, whether the mineral interest has

[37] Medicaid for the Elderly and People With Disabilities Handbook § F-1221.1

[38] Medicaid for the Elderly and People With Disabilities Handbook § F-3000; Medicaid for the Elderly and People With Disabilities Handbook § F-4213

been severed from the surface rights or not.
been severed from the surface rights or not.
been severed from the surface rights or not.
been severed from the surface rights or not.
been severed from the surface rights or not.

[44] See Medicaid for the Elderly and People With Disabilities Handbook § E-6100

If the farm or ranch is "business property" and is essential to self-support for the applicant, then it may be exempt under the business property sections of the Medicaid for the Elderly and People With Disabilities Handbook, regardless of value.[42]

This section requires that a "valid trade or business" is being carried on and that any property exempted under this section be in use or previously in use and expected to be in use again.[43]

Additionally, although "material participation" is not mentioned in the business property exemption section of the Medicaid for the Elderly and People With Disabilities Handbook, it is a requirement to exempt business property, and the conditions for what qualifies as "material participation" are laid out in the Medicaid for the Elderly and People With Disabilities Handbook's sections on earned income.[44]

The "material participation" requirement allows HHSC to determine that the property is "used" in the business as required in Medicaid for the Elderly and People With Disabilities Handbook

§ F-4330. The guidelines for material participation include "The owner engages in periodic advice and consultation with the tenant, inspection of the production activities, and furnishing of equipment, machinery, and livestock and production expenses", among

[40] Medicaid for the Elderly and People With Disabilities Handbook § F-4213

[41] See Medicaid for the Elderly and People With Disabilities Handbook § F-3600

[42] Medicaid for the Elderly and People With Disabilities Handbook § F-4330

[43] *Id.*

other definitions.
other definitions.
other definitions.

46 Medicaid for the Elderly and People With Disabilities Handbook § F-4310

As a practical matter, use of the business property exemption is problematic, especially where there is a lease on the farm property. Although the materially participating language includes consultation with the tenant as sufficient, HHSC has been treating leased property as income producing non-business property, capable only of falling into the $6,000/6% rule, discussed below. This makes practical application of business property hard. Where this situation occurs, a good estate planner may wish to inquire into the terms of the lease and/or try to find another method of protecting the farm property.

There is an exception which can often cover small mineral interests unrelated to the homestead. This is the $6,000/6% rule.[46] Technically, this exemption can apply to any non-liquid property essential to self-support, but in practice is generally limited to mineral interests, as other real property interests likely to have an equity value of $6,000 or less tend not to produce income at 6%. Even with mineral interests that fall under this exception initially, there can be problems as either the value of the mineral interest increases with new discovery of mineral deposits and/or improved technology for recovering those mineral deposits, or the production slows and income drops to less than 6% as mineral interests are drained. It is ideal, then, not to have to rely on this exemption, if possible.

Once the interests and their treatments under the Medicaid rules are determined, the question is: What do I, as a conscientious estate planner, do with farms, ranches,

45 *See Id.*

and/or mineral interests? The answer may be nothing, if those interests belong to your client and are a part of the exempt homestead or the client or his spouse is materially participating in the business. It is a good idea though to plan for the passing of these farming and ranching operations to future generations. For this transfer, it may be a good idea to leave the family farm in trust for the benefit of the beneficiaries (usually the children). This trust may name one of the children as Trustee if that child's share would be exempt as business property or homestead property to that beneficiary. In that event, the resource would be ordinarily countable to the child, but could be excluded under the Medicaid rules discussed. Under such circumstances, it would be important to have no other resources in the trust and to include language discharging a Trustee who no longer meets one of the two exemption requirements.

VI.

Avoiding MERP: How to Transfer the Resources You've Protected

[48] *Id.* The Medicaid Estate Recovery Program is the boogeyman of the elderly. Many people refuse to receive Long Term Care Medicaid benefits which may subject their estate to MERP because of misconceptions about the state coming back and taking everything they own. It is a program that is misunderstood by many, including many people who practice probate law, estate planning, and underwrite title policies. The Medicaid Estate Recovery Program is not a lien program. There are no circumstances in the state of Texas under which HMS (the private company tasked with operating the MERP) could place a lien on the home of an individual who has received Medicaid benefits.[47]

MERP is a creditor claim statute.[48]

In effect, the State of Texas, as represented by HMS, to be a class seven creditor of the probate estate of an individual who dies after

[47] 15 TAC § 373.103 – 15 TAC § 373.201; See also Texas Estates Code § 355.102(h)

receiving a specific type of Medicaid benefit (Medicaid that covers long term care at home or in a nursing facility). MERP's only possible avenue for collection is to make a claim against the probate estate of such an individual.

How to avoid MERP then is clear: don't have a probate estate. This is easily done with most assets. Beneficiary designations and rights of survivorship can take care of bank accounts, employment related benefits plans, life insurance policies, and other similar financial instruments.

The difficulty arises with the largest asset most Medicaid recipients will die owning: the homestead. Most people own their homes in fee simple with no rights of survivorship. Outright transfer of the home during the lifetime of the Medicaid recipient is problematic except in very specialized circumstances. Most transfers for less than fair market value during Medicaid receipt or in the five years leading up to Medicaid application will result in a transfer penalty during which the disabled individual is eligible (does not have income and/or resources sufficient to pay for the cost of care and yet has the medical necessity to need that care) but is unable to receive benefits while waiting out the transfer penalty period.[49]

[50] Medicaid for the Elderly and People With Disabilities Handbook Glossary *http://www.dads.state.tx.us/Handbooks/mepd/Glossary/index.htm*; Medicaid for the Elderly and People With Disabilities Handbook § I-3100

The solution is to transfer the home only upon the passing of the individual. This is where Lady Bird deeds can be used to protect the home.[50]

Lady Bird deeds or Enhanced Life Estate deeds make no transfer during the lifetime of the Grantor. The Grantor retains a life estate and a number of other rights, including the right to sell or mortgage the property without the joinder of the named Grantee(s) and retain all proceeds, the right to lease the property beyond the Grantor's own life span, and the right to name different or additional beneficiaries. In this way, the Grantor creates only a contingent remainder interest, rather than the vested interest a traditional life estate deed

[49] Medicaid for the Elderly and People With Disabilities Handbook § I-2100

creates. That vested interest created by a traditional life estate deed has a value at present and so triggers a transfer penalty. Using a Lady Bird Deed, the property transfers upon the death of the Grantor. This avoids MERP by avoiding probate, but creates no penalizable transfer during the lifetime of the Grantor. HHSC has made the determination that Lady Bird deeds indeed convey nothing at the time of the deed and so trigger no transfer penalty, though they should still be properly reported to HHSC when done for an individual presently receiving Medicaid benefits.

[54] Id.

Where planning and use of a Lady Bird deed is not possible, there are statutory exceptions to MERP that should be evaluated. The most common is for a surviving spouse.[51] Where there is a surviving spouse, HMS cannot make a claim against the probate estate even if there would otherwise be a valid claim. Similarly, though more limited in scope, there is an exemption to a claim against the homestead if an adult unmarried child had been living in the home for at least one year prior to the death of the Medicaid recipient.[52] Another exemption exists for an adult child of the deceased Medicaid recipient who is disabled pursuant to the Social Security Administration's definition of disability.[53] There is also a hardship exemption for a child beneficiary with a low enough annual income.[54] It is important to note that many of these exceptions involve a paperwork burden that can be onerous for a disabled individual or recently grieving child to meet, but they are available and can be met where appropriate.

VII.

Conclusion

[51] 15 TAC § 373.205

[52] *Id.*

[53] *Id.*

After the radical increase of the Estate Tax exemptions as well as the liberalization of the portability rules under the Obama administration, Estate Tax considerations are no longer the primary focus for most Americans. Because of this, an estate planner who wants to protect her clients might not need to even discuss estate taxation with most of her clients. While it is still important to check with a client to determine potential estate tax implications, a savvy planner will always discuss the potential need for long-term care Medicaid planning.