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Medicaid Eligibility: Using Estate Planning Techniques

Leveraging Gifting, Income Planning and Asset Transfer Strategies to Support Client's Eligibility

TUESDAY, JUNE 18, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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BASIC ELIGIBILITY: USING ESTATE PLANNING TECHNIQUES

Basic Eligibility Issues

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TRANSFER OF ASSETS OR RESOURCES

- Purposes of Transfer Limitations.
- To Disqualify applicants and recipients who intentionally transfer, or whose spouse intentionally transfer assets for less than fair market value to obtain Medicaid eligibility for long-term care services.
- Limited Reach of Transfer Rule
- Disqualification limited to LTC Services. Generally LTC services refers to nursing home care and community-based care “waiver” services.
- Disqualification limited to penalty period.

PENALTY PERIOD

- Penalty Period – is the time during which a Medicaid applicant or recipient is ineligible for Medicaid LTC benefits. The penalty period is calculated by the eligibility worker once a prohibited transfer has been established.
- Medicaid requires information about transfers of both income and resources that occurred during the five years before the Medicaid application date.

PENALTY PERIOD CONT.

- The penalty period does not commence until the applicant would otherwise be eligible for Medicaid payment of LTC services, if a penalty period were not to be imposed.
- The applicant must be in need of nursing home services.
- Has income and assets within the applicable limits.
- Has applied for and been found eligible for benefits *but for the penalty imposed by reason of the asset transfer(s).*

Imputed Transfers of Assets

- Transfers that eliminate or reduce ownership or control. Refusing to act may be deemed a transfer of asset such as refusing to take legal action to obtain payment.
- Transfer by Surrogate of Applicant. Transfers by agent under power of attorney, by the guardian or conservator will be imputed to the Medicaid applicant or recipient.
- Transfers by Spouse. However, transfers by the community spouse after eligibility has been established do not affect eligibility.

EXEMPT TRANSFERS

- Transfers Without Intent to Obtain LTC Services. The applicant must provide ‘convincing and objective evidence that the individual or spouse had no reason to believe that Medicaid coverage might be needed.
- Transfers for Adequate Compensation.
- Transfers to Specified Transferees.
- Spouse and Minors – transfers to or from a spouse are exempt. Transfers to the applicant’s or recipient’s child under 21 is exempt. Transfers to the applicant’s or recipient’s blind or disabled child of any age are exempt.
- Disabled Persons as Trust Beneficiaries – There is no requirement for a kindred relationship for transfers of property to the trustee of a first party special needs trust established under 42 U.S.C. 1396p(d)(4)(A). Also applies to pooled trusts.

EXEMPT TRANSFERS CONT.

- Home Transfer Exemptions
- The *home* may be transferred to a sibling who has an equity interest in the home if the transferee's sibling resided in the home for at least one year immediately preceding institutionalization of the applicant/transferor.
- The *home* may be transferred to an adult child who resided in the home for at least two years immediately before the date the individual became institutionalized if the adult child provided care for the applicant at home that would otherwise have been provided in a nursing home. Written verification from the caretaker child, a physician and third party are required.
- The *home* may be transferred to an applicant's child under 21, the applicant's disabled child and to the applicant's spouse.

THE ‘LOOK-BACK’ PERIOD AND CALCULATING THE PENALTY PERIOD

- **Look-Back** Period – is the period of time in which Medicaid may consider gifts and undervalued sales as uncompensated transfers to disqualify the applicant from Medicaid LTC coverage.
- The Look-Back date is 60 months before the individual is both (a) an institutionalized individual and (b) has applied for Medicaid.
- Penalty Calculation – The federal Deficit Reduction Act of 2005 imposed harsh rules to inhibit transfers of assets.
- Extension of the penalty to include partial months of ineligibility.
- Deferred the penalty commence date years after the uncompensated transfer.
- Worker calculates penalty by: (i)the sum of all uncompensated transfers with the 60 month look back period (ii) divide that by the average monthly cost of nursing home care for a private-pay resident in the locality at the time of application for Medicaid.

SPECIAL CASE OF ANNUITIES

- An annuity purchased after February 8, 2006 by or for the benefit of the community spouse is excluded provided the annuity is:
 - Purchased with proceeds as defined by the IRS as retirement accounts or funds
 - Irrevocable and nonassignable;
 - Actuarially sound (period of payment does not exceed the annuitants life expectancy).
 - Provides for payment in equal amounts during the term of the annuity, with no deferral and no balloon payments.
- When the annuity is purchased with non-retirement funds by either the community spouse or institutionalized spouse the annuity must:
 - (i) name the State as the remainder beneficiary in the first position
 - (ii) name the State as secondary beneficiary after the community spouse or minor or disabled child is named in the first position.

ACTIONS SUBJECT TO THE TRANSFER OF ASSET PROVISIONS

- giving away or selling property
- disclaiming an inheritance or not asserting inheritance rights in court
- clauses in trusts that stop payments to the individual
- putting money in an irrevocable trust
- payments from a trust for a purpose other than benefit of the individual
- irrevocably waiving pension income
- not accepting or accessing injury settlements
- giving away income during the month it is received
- refusing to take legal action to obtain a court-ordered payment that is not being paid, such as alimony or child support
- placement of lien or judgment against individual's property when
- not an "arm's length" transaction (see below)
- other similar actions.

INCOME AND RESOURCE ELIGIBILITY

- Single Person

- A recipient's income is deemed available to pay for the monthly cost of care. Medicaid then pays the nursing facility the balance up to the Medicaid rate. Medicaid determines the *patient's pay* (patient's monthly income minus deductions).
- Deductions from Income. A person's income, minus deductions is applied to the cost of his or her care in the institution. Deductions include:
 - Basic personal allowance (\$40 monthly in Virginia)
 - Health insurance premiums
 - Guardianship fee (limited up to 5% of income)
 - Unpaid medical expenses

INCOME AND RESOURCE ELIGIBILITY CONT.

- The applicant's or recipient's resource allowance is \$2,000. All other resources, with the exception of exempt resources, are countable (deemed available to pay for the cost of care).
- Exempt Resources
- A motor vehicle of any value is excluded as a countable resource.
- Burial Arrangements.
- Self-settled Special Needs Trusts for Disabled Persons.

SPECIAL RULES FOR MARRIED COUPLE

- All resources however held by either spouse are considered available.
- Community Spouse is allowed to retain a resource allowance.
- Eligibility is obtained once the combined resources are reduced to spousal resource allowance plus \$2,000 resource exemption to the institutionalized spouse.
- Post eligibility receipt of assets to the community spouse are not countable resources.

SPECIAL RULES FOR MARRIED COUPLE CONT.

- Income is treated differently. Income paid to the community spouse is not considered available.
- Income Allowance – Community spouse is allowed to retain a portion of the institutionalized spouse's income to maintain the spouse in the community.



Using Estate Planning Tools To Allow for Medicaid Planning

Presented by:

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Planning

- Careful planning, whether in advance or in response to an unanticipated need for care, can help protect your clients' estates.
- Estates planning provisions that can be built into a plan for what I call “defensive Medicaid planning” just in case.
- Attorneys should advise their clients about all options for paying for long term supports, including but not limited to purchasing long-term care insurance or by making sure they understand what they are entitled to under the Medicare and Medicaid programs.
- Veterans may also seek benefits from the Veterans Administration.

Sample Provisions for Power of Attorney to Address

My Agent shall have the following powers with respect to benefits from Social Security, Medicare, Medicaid or other governmental programs, or civil or military service:

- (a) execute vouchers in my name for allowances and reimbursements payable to me by the United States or a foreign government or by a state or subdivision of a state, including allowances and reimbursements for transportation of the individuals, and for shipment of their household effects;
- (b) take possession and order the removal and shipment of my property from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;
- (c) prepare, file, and prosecute a claim of mine for a benefit or assistance, financial or otherwise, to which I claim to be entitled under a statute or governmental regulation;

Sample Provisions for Power of Attorney to Address (*cont*)

- d) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits or assistance I may be entitled to receive;
- e) receive the financial proceeds of a claim of the type described in this section and conserve, invest, disburse, or use anything so received for a lawful purpose; and
- f) execute documents on my behalf in relation to any governmental benefit and to execute Social Security Administration Form SSA-1691-U4, "Appointment of Representative" and the Veterans Administration VA Form 21-22a, "Appointment of Individual As Claimant's Representative" and similar documents, delegating to my Agent and others full authority to act on my behalf.

Extraordinary Sample Estate Planning Provisions for Power of Attorney

EXTRAORDINARY POWERS AND LIMITATIONS

My Agent shall have the enumerated extraordinary powers set forth in this section. However, my Agent may only exercise the authority provided in this section in a manner reasonably designed to preserve the dispositive scheme established by my estate planning documents that are in existence at the time of my incapacity. If my Agent is not otherwise familiar with my estate plan, my Agent shall contact my attorney and obtain copies of my latest estate planning documents for review. My signature on this document shall also serve as a signed release, authorizing my attorney and my accountant to provide copies of my most recent estate planning and financial documents to my Agent.

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

- a) My Agent may continue any practice I may have of making gifts to my relatives to commemorate birthdays, holidays, weddings, graduations, births and similar occasions. My Agent may make transfers to my relatives for purposes of reducing federal estate tax or other tax liability. My Agent further may make transfers to my relatives for purposes of applying for and qualifying for government benefits such as, but not restricted to, SSI, Medicaid or Section 8 or other housing programs, even if such decision results in my being deprived of the beneficial ownership of that property or if such decisions result in the triggering of a period of ineligibility for receipt of such government benefits. Except as otherwise provided in this document, my Agent shall have the power to make gifts of any of my property to individuals or organizations as my Agent determines to be in my best interest based on all relevant factors, including:

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

1. the nature of my property;
2. my foreseeable obligations and need for maintenance;
3. minimization of income, estate, inheritance, generation-skipping transfer or gift taxes;
4. **eligibility for public benefits or assistance under a statute or governmental regulation; and** (emphasis added)
5. my personal history of making or joining in the making gift while living.

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

- b) My Agent may make additional gifts to pay for educational expenses of any descendant of mine. Educational expenses include: education at vocational or trade school; training in music, stage, arts, and sports, special training provided at institutions for the mentally or physically handicapped; undergraduate and graduate study in any field at public or private universities, colleges, or other institutions of higher learning. In providing for such education, pay for tuition, books, and incidental charges made by the educational institutions, travel costs to and from such institutions, room and board, and a reasonable amount of spending money. In addition, my Agent may create, fund or contribute to any Qualified State Tuition Program under Section 529 of the Internal Revenue Code for the benefit of the person under any jurisdiction. I authorize my Agent to select any options, including but not limited to, the establishment of the owner, beneficiary and contingent beneficiary, in the best interests of the person and consistent with my estate plan and the Internal Revenue Code.

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

- c) My Agent may make gifts to charities, provided such gifts qualify for a charitable deduction under the income and gift-tax provisions of the Internal Revenue Code as from time to time amended. This power includes, but is not limited to, the right to enforce any charitable trust of which I am the Grantor or Trustee.
- d) My Agent may make gifts without limitation as to amount in order to facilitate my qualifying for the receipt of governmental benefits for my long-term health-care and nursing-home needs. Such gifts shall be irrevocable, and my Agent is authorized to make such gifts as long as my long-term care is reasonably provided for by my Agent from the assets subject to this Power or otherwise, during the time period I would be disqualified from receiving long-term care and/or medical assistance under the State of Michigan "Medicaid" program, Veterans program, or other public-assistance program. Any gifts made pursuant to this subparagraph are to be made to those individuals who would take my assets pursuant to my then-existing testamentary plan or, if I have no existing testamentary plan, according to the intestate laws of the State of Michigan. Any gifts may be made outright or in trust. Any gifts made pursuant to this Paragraph by my Agent may also include a gift to my Agent as long as the gift is made in the same manner as my established estate plan, if I have one, or pursuant to the intestate laws of the State of Michigan.
Due to the ever-changing laws related to eligibility for public long-term care benefits, I direct my Agent to consult with counsel before using this power. (emphasis added)

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

- e) My Agent may make a gift to himself or herself under this paragraph, notwithstanding the fact that my Agent is a fiduciary under this instrument, provided my Agent understands that the primary purpose of these gifts is to assist me in benefiting my relatives and qualifying for public assistance.
- f) Notwithstanding any other provision of this instrument, my Agent shall not participate in the exercise of a power or discretion conferred under this instrument that would cause my Agent to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code of 1986, as amended.

Create Trusts. My Agent may create and execute revocable and/or irrevocable trusts(s) agreement(s) upon such terms and conditions as my Agent shall deem appropriate. My Agent may select any individual(s) or institution(s) to serve as trustee(s) or successor trustee(s) of said trust(s), as my Agent shall deem appropriate. Trust(s) created by my Agent may be for my benefit, for the benefit of my spouse, or for the benefit of any of my descendants. **I understand the creation of such a trust(s) may result in my being unable to have access to or the benefit of such trust assets, and the income there from for my support, maintenance, care and comfort; nevertheless, I hereby specifically authorize my Agent to create such a trust, which decision shall be in my Agent's sole and uncontrolled discretion.** (emphasis added)

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

Amend, Revoke, Restate, Reform and Terminate Trusts. My Agent may amend, restate, reform or revoke, any trust agreement created by me, before or after the execution of this Power of Attorney; or created by my Agent pursuant to the authority granted to him/her pursuant to this Power of Attorney; which trust agreement(s) may, according to its terms, be amended or revoked by me, individually or in conjunction with others; and to consent to the amendment, revocation, reformation, restatement or termination of any trust agreement(s) in which I have an interest, which agreement(s) may be amended, revoked, reformed, restated or terminated by court order.

Transfers to Trust. My Agent may transfer and convey any property or interest in property that I own to any revocable or irrevocable trust created by any other person for my benefit.

Establish a Trust Agreement for [PERSON'S NAME]. My Agent may establish a trust agreement for the benefit of my [RELATION], [PERSON'S NAME], and make gifts either in trust or outright to or for the benefit of [PERSON'S NAME], which gifts may include any residence I may own. This may only be done if doing so does not disqualify me for any public benefits for which I may be eligible.

Extraordinary Sample Estate Planning Provisions for Power of Attorney (cont)

Withdraw Income and Principal from Trust. My Agent may withdraw and/or receive, on my behalf, income and/or principal of a trust to which I may be entitled.

Enforcement of a Charitable Trust. My Agent may maintain a proceeding to enforce any charitable trust created by me, whether such trust was executed before or after the execution of this Durable Power of Attorney.

Transfer of Assets to Obtain Eligibility for Public Benefits. My Agent may transfer my ownership interest in my home or other assets to my issue, including my Agent, to obtain eligibility for public benefits, including Medicaid for me, and to avoid any claim for reimbursement from the State of Michigan upon my death. (emphasis added)

Powers Related To My Personal Care

Entry Into My Homestead. My Agent is authorized to gain entry into my home, apartment, condo, co-op, mobile home or any other form of my homestead to care for or retrieve personal property of any nature, during anytime during my lifetime that I may not occupy it (e.g. during hospitalization, long-term care, vacation, etc), or after my death.

Living Arrangements. I wish to remain in my current residency (presuming it to be my personally determined “homestead” e.g. home, apartment, condo, mobile home etc.), for as long as possible, where my Agent is to use my resources to hire aid to maintain me here for as long as is practicable. At the time it appears that another setting would better suit my increasing needs, my Agent is empowered to change my living arrangement to one that increases my quality of life and is more appropriate to my care needs.

Powers Related To My Personal Care (cont)

Residence and Care. If there is any conflict between this document and my appointment of Patient Advocate, my appointment of Patient Advocate shall be primary. My Agent may determine my place of residence from time to time, pay my ordinary household expenses, arrange for and pay the costs of medical, dental, nursing, hospital, convalescent and other health care and treatment, including admission to hospitals, nursing homes, rest homes or other care facilities or institutions, consent to treatment, and apply for insurance, pension or employee benefits related to such health care and treatment, including, but not limited to, benefits under Social Security, Medicare and Medicaid. My Agent may obtain on my behalf copies of medical reports, summaries or other related information concerning me made or taken before or after the date of this instrument, including, but not limited to, records or communications, and execute any written consents on my behalf for the disclosure of such records or communications to such persons or entities as my Agent deems appropriate. My Agent and my Patient Advocate each shall be considered my “personal representative” for purposes of the privacy rule issued by the U.S. Department of Health and Human Services and required by the Health Insurance Portability and Accountability Act of 1996, 45 CFR Parts 160 and 164, as from time to time amended (“HIPAA”).

Powers Related To My Personal Care (cont)

Personal and Medical Care. My Agent may make any judgment necessary for the proper and adequate care and custody of me and my family; fire, employ, pay for and discharge such domestic help, nursing services, and practical or registered nurses as my Agent may determine to be in the best interests of my health; and give an informed consent or an informed refusal on my behalf with respect to my physical or mental health care and comfort, including specifically, by way of illustration only and not by way of limitation:

- a) Any medical care, diagnosis, surgical procedure, therapeutic procedure or other treatment of any type or nature;
- b) Any physical rehabilitation program;
- c) Any dental procedure;
- d) Any psychiatric or psychological care or treatment;
- e) The admission to any hospital, medical center, nursing home, or mental institution;

Powers Related To My Personal Care (cont)

- f) The use of any drugs, medication, therapeutic devices, or other medicines or items related to my health;
- g) The execution of waivers, medical authorizations and such other approval as may be required to permit or authorize care which I may need;
- h) The waiver of any doctor-patient privilege; and in general take and authorize all acts with respect to my health and well being, and to expend all amounts in connection therewith, to the same extent as I could, if mentally competent to do so. The prices, costs, expenses and compensation incurred in furtherance of the foregoing are all to be within the sole and absolute discretion of my Agent.

Care Contracts. My Agent is authorized to hire individuals to provide care for me and to enter into contracts for such care. It would be my desire that my personal care needs be provided by family members and friends closest to me. Recognizing that providing such care can impose significant hardship on family and close friends, my Agent is authorized to pay up to *two dollars per hour or its equivalent* beyond the going area market rate (determined by canvassing five area agencies providing a similar service and averaging their rates). (emphasis added)

Powers Related To My Personal Care (cont)

Care of Pets. My Agent is authorized to provide care for any pets I may have, enter into contracts for their care, have my pets foster-parented, or keep them. IN NO CASE ARE THEY TO BE EUTHANIZED unless my pet(s) suffer from an irreversible illness that is causing my pet(s) great suffering.

Privacy Rights. My Agent is authorized to assert and/or waive my right to privacy as my Agent deems appropriate. This **does not** include isolating me from my friends and family. This does include, but is not limited to, the right to electronically record and monitor me and authorize others to do so, so that my care can be monitored from afar.

Medical and Personal Records; HIPAA Release Provisions.

- a) ***Declaration of Intent.*** I intend for my Agent to be treated as a “personal representative” under 45 CFR 164.502(g). Therefore, my Agent shall be treated as I would be with respect to my rights regarding the request for, receipt, review of, access to, use and disclosure of my individually identifiable health information or other medical records including the authority to execute any releases or other documents that may be required to obtain this information. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPAA), 42 USC 1320d and 45 CFR 160-164 and rules and regulations issued thereunder. It is also my express intention that my Agent be treated as an “authorized representative” as that term is defined by the Medical Records Access Act, MCL 333.26263.

Powers Related To My Personal Care (cont)

b) ***HIPAA Authorization; Release Provisions.***

1) In accordance with the release authority, I authorize Any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other covered health care provider, any insurance company, and the Medical Information Bureau, Inc., or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services, to give, disclose, and release to my Agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present, or future medical or mental health condition, to include all information relating to the diagnosis and treatment of sexually transmitted diseases, mental illness, and drug or alcohol abuse.

2) My Agent has my permission to use and disseminate this information in my Agent's discretion.

3) The authority given to my Agent shall supercede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given to my Agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

Powers Related To My Personal Care (cont)

Funeral Representative. Upon my death and related to the care of my person, my Agent is to be considered as my Funeral Representative, having the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of my body, including but not limited to: (a) decisions about cremation, (b) the right to possess my remains, and (c) handling the details of my funeral service or memorial arrangements and contents, including the power to request certain individuals to perform certain parts of such ceremony. The handling, disposition, or disinterment of my body shall be under the supervision of a person licensed to practice mortuary science in this state. Should such provision within my General Durable Power of Attorney be deemed unenforceable, then this designation should be considered my wish. Should my Agent decline or is unavailable to exercise such power, then a Funeral Representative should be designated in accordance to MCL 700.3206.

Sample Trust Provisions

- A. Retention in Trust: Withdrawal by Grantors. The Trustee shall retain the Trust property, other than the initial cash contribution which the Trustee shall not be obligated to invest or reinvest, in Trust, and shall pay the entire net income arising therefrom in regular installments to Grantors, during Grantors entire lifetime or, as directed by Grantors from time to time, retain and reinvest all or designated portions thereof. Grantors may also from time to time withdraw all or any portion of the principal of the Trust property by making request therefore to the Trustee.

- B. Payment To or For the Benefit of Grantors and Grantor's Spouse and Dependents. If Grantors are at any time unable to exercise the right to demand income and/or principal by reason of physical, mental or other incapacity, the Trustee shall pay to, or use and expend for the benefit of Grantors and Grantor's spouse and dependents, so much of the current or accumulated net income, and so much of the principal, even to the exhaustion thereof, as shall be necessary for their health, support and maintenance in accordance with their accustomed manner of living until Grantors are again able to exercise Grantors right to demand income and/or principal.

Sample Trust Ptovisions (cont)

- C. Payment for Grantors Care. In providing for the care of Grantor, the Trustee shall spend as much of the net income and principal of the Trust as the Trustee, in the Trustee's sole, absolute, and uncontrolled discretion, deems necessary and reasonable under the circumstances then prevailing to provide the maximum level of medical, nursing, rehabilitative and/or comfort care for Grantors including the following:
1. If Grantors are Hospitalized. The Trustee shall have the discretion to seek a level of care for Grantors beyond that which would ordinarily be provided in a hospital setting including, if and when appropriate in the sole, absolute, and uncontrolled discretion of the Trustee, arranging for Grantors to be placed in a private room or, if available, in a more luxurious type of accommodations now offered by some hospitals, and by hiring registered or practical nurses, or other caregivers, as appropriate, on a part-time, full-time or twenty-four hours basis to supplement the regular level of hospital care.

Sample Trust Provisions (cont)

2. If Grantors are Not Hospitalized. Grantors prefer to remain in Grantors own home as long as it is reasonable to do so in the sole, absolute, and uncontrolled discretion of the Trustee. If Grantors medical condition is such that nursing care and/or medical equipment is required for Grantors care, the Trustee shall undertake all reasonable efforts to provide such care for Grantors at Grantors home, including the hiring of part-time, full-time or twenty-four (24) hour nurses or other caregivers, the renting or purchasing of any medical equipment necessary for the care of Grantors and accommodating, by architectural changes if necessary, any physical needs of Grantors.

3. Assistance in Daily Living for Grantor. The Trustee is authorized to spend the net income and/or principal of the Trust to provide personal aides, homemakers, bill-payers, or other persons who may assist Grantors in Grantor's daily living and otherwise enable Grantors to continue to reside in Grantors home for as long as it is reasonable to do so, taking into account both safety and financial considerations, in the sole, absolute, and uncontrolled discretion of the Trustee.

Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability

If any share hereunder becomes distributable to a beneficiary who has not attained the age of twenty-five (25), such share shall immediately vest in the beneficiary, but notwithstanding the provisions herein, the Trustee shall retain possession of the share in Trust for the beneficiary until the beneficiary attains the age of twenty-five (25), using so much of the net income and principal of the share as the Trustee deems appropriate, in the Trustee's sole discretion, taking into consideration to the extent the Trustee deems advisable any other income or resources of the beneficiary or his or her parents known to the Trustee.

- A. The Trustee is authorized to accumulate the net income or to pay so much of the net income or principal from the Trust as deemed appropriate for the beneficiaries. **This Trust shall not be construed as a support Trust and is established as a pure discretionary Trust.** (emphasis added) Under no circumstances shall the beneficiaries, or their lineal descendants, have the power or authority to demand any distribution from the Trustee who is under no obligation, implied or otherwise, to make any distributions to them. Further, the Trustee may withhold distributions to them if, in its sole discretion, the distributions would not be consistent with the Grantors intentions as expressed in this Agreement.

Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability (cont)

- B. In the event that the Trustee is requested by any creditor of the beneficiaries, or their lineal descendants', to petition a court of competent jurisdiction or for the release of principal or income from the Trust Estate, the Trustee is authorized to deny such request and authorized to defend at the expense of the Trust Estate any contest or other attack of any nature on the provisions of this Trust.

- C. The Trustee is granted with the continuing, absolute and discretionary power to deal with the funds of this Trust, with those powers to be exercised independently and without any prior or subsequent approval of any court or judicial authority. No person dealing with the Trustee shall be required to inquire into the propriety of the Trustee's actions.

Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability (cont)

D. In case the income or principal payment under any Trust created hereunder or any share thereof shall become payable to a person over the age of twenty-five (25), but who is a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability, or substance abuse, is, in the opinion of the Trustee unable properly to administer such amounts, then such amounts shall be paid out by the Trustee in such of the following ways as the Trustee deems best: (1) directly to the beneficiary; (2) to the legally appointed guardian of the beneficiary; (3) to some relative or friend for the medical care, education, support and maintenance in reasonable comfort of the beneficiary; (4) by the Trustee using such amounts directly for the beneficiary's care, and education; (5) to a custodian for the beneficiary under the Uniform Gifts or Transfers to Minors Act.

Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability (cont)

E. The Trustee may, in his or her discretion, create, fund or contribute to any qualified State Tuition Program under Section 529 of the Internal Revenue Code for the benefit of the beneficiary under any jurisdiction. The Trustee is specifically authorized to select any options, including but not limited to the establishment of the owner and contingent beneficiary or person in the event of the death of the beneficiary, in the best interest of the beneficiary and consistent with the Internal Revenue Code. This Article is to be effective only, and is limited in duration, to the extent that it does not result in any violation of any applicable rule against perpetuities or similar law. If the beneficiary dies before reaching the age of twenty-five (25), the remaining Trust fund is to be distributed to that beneficiary's then living lineal descendants per stirpes, or if that beneficiary leaves no lineal descendant then living, to the heirs at law of that beneficiary, as determined as of that time under the laws of Michigan in effect at the execution of this Agreement.

Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability (cont)

- F. If a beneficiary becomes engaged to be married, the Trustee shall have the power to withhold distributions until the execution of a Prenuptial Agreement. The Trustee shall have the power to secure legal counsel for the drafting of any Prenuptial Agreements and shall expend funds from the Trust corpus to pay any associated legal fees.
- G. The Trustee may, in his or her discretion, apply all or any portion of the property directly for the beneficiary's benefit, and for the benefit of anyone dependent upon such beneficiary, in such manner, as the Trustee, in his or her absolute discretion, considers appropriate and in the best interest of the person. No distribution under this instrument to or for the benefit of a minor beneficiary shall discharge the legal obligation of the beneficiary's parents to support him or her in accordance with the laws of the parents domicile.

Any income not so paid or applied shall be accumulated and added to principal. The beneficiary's share shall be paid over and distributed to the beneficiary upon attaining age twenty-five (25), or if he or she shall sooner die, to his or her personal representatives. The Trustee shall have with respect to each share so retained all the powers and discretions it had with respect to the Trusts created herein generally. The Trustee shall act as Conservator for minor children if one is required.

Sample Revocable Trust Provisions

The Trustee may continue any practice of making gifts to Grantors relatives to commemorate birthdays, holidays, weddings, graduations, births and similar occasions. The Trustee may make transfers to Grantors relatives for purposes of reducing federal estate tax or other tax liability. The Trustee further may make transfers to Grantors relatives for purposes of applying for and qualifying for government benefits such as, but not restricted to, SSI, Medicaid or Section 8 or other housing programs, even if such decision results in Grantors being deprived of the beneficial ownership of that property or if such decisions result in the triggering of a period of ineligibility for receipt of such government benefits. Except as otherwise provided in this document, the Trustee shall have the power to make gifts of any of Grantors property to individuals or organizations as the Trustee determines to be in Grantors best interest based on all relevant factors, including:

- A. The nature of Grantors property;
- B. Grantors foreseeable obligations and need for maintenance;
- C. Minimization of income, estate, inheritance, generation-skipping transfer or gift taxes;
- D. Eligibility for public benefits or assistance under a statute or governmental regulation;
- E. Grantors personal history of making or joining in the making of gifts while living.

Sample Revocable Trust Provisions

- F. To make additional gifts to pay for educational expenses of any of Grantors descendants. Educational expenses include: education at vocational or trade school; training in music, stage, arts, and sports, special training provided at institutions for the mentally or physically handicapped; undergraduate and graduate study in any field at public or private universities, colleges, or other institutions of high learning. In providing for such education, to pay for tuition, books, and incidental charges made by the educational institutions, travel costs to and from such institutions, room and board, and a reasonable amount of spending money. In addition, the Trustee may create, fund or contribute to any Qualified State Tuition Program under Section 529 of the Internal Revenue Code for the benefit of the person under any jurisdiction. Grantors authorizes the Trustee to select any options, including but not limited to the establishment of the owner and contingent beneficiary or person in the event of the death of the person, in the best interests of the person and consistent with Grantors estate plan and the Internal Revenue Code.
- G. To make gifts to charities, provided such gifts qualify for a charitable deduction under the income and gift-tax provisions of the Internal Revenue Code as from time to time amended. This power includes, but is not limited to, the right to enforce any charitable Trust of which Grantors are the Grantors or Trustee.

Sample Revocable Trust Provisions

- H. To make gifts without limitation as to amount in order to facilitate Grantors qualifying for the receipt of governmental benefits for Grantors long-term health-care and nursing-home needs. Such gifts shall be irrevocable, and the Trustee is authorized to make such gifts as long as Grantors long-term care is reasonably provided for by the Trustee from the property subject to this Trust or otherwise, during the time period Grantors would be disqualified from receiving long-term care and/or medical assistance under the State of Michigan "Medicaid" program, Veterans program, or other public-assistance program. Any gifts made pursuant to this subparagraph are to be made to those individuals who would take Grantors property pursuant to the terms of Article Nine.
- I. To make gifts to himself or herself under this Section, notwithstanding the fact that the Trustee is a fiduciary under this instrument, provided the Trustee understands that the primary purpose of these gifts is to assist Grantors in benefiting Grantors relatives and qualifying for public assistance. Notwithstanding any other provision of this instrument, the Trustee shall not participate in the exercise of a power or discretion conferred under this instrument that would cause the Trustee to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code of 1986, as amended.

Conflicts with Patient Advocate for Medical Treatment.

If there is disagreement between my Patient Advocate for mental health treatment and my Patient Advocate for medical care regarding authorization of treatment which affects both my medical status and mental health, instructions from the following shall receive priority (*select one if applicable*):

- Patient Advocate for Mental Health Treatment, or
 Patient Advocate for Medical Treatment

Furthermore, if a dispute arises as to whether the course of treatment which affects both my medical and mental health status is in my best interest, my Patient Advocate identified above shall obtain the advice from

_____ to determine the course of treatment. If this conflict is not resolved, then my Patient Advocate for either Mental Health Treatment or Medical Treatment reserves the right to petition the court for instructions.

C. ADDITIONAL PROVISIONS

12. **Nomination of Guardian.** If a guardian of my person is necessary, I nominate (*select one*)

- Patient Advocate for Mental Health Treatment, or
 Patient Advocate for Medical Treatment to serve as my guardian

Other Options

1. Using discretionary testamentary trust for the spouse

Tripp, A. R. (2011). Planning With Discretionary Testamentary Trust (A Useful Tool in the Planner's Box). *Michigan Probate & Estate Planning Journal*, 31(1), 60. Retrieved from <http://www.michbar.org/probate/pdfs/winter11.pdf>

Funding discretionary testamentary trust for spouse via a pourback trust: Using marital estate to fund a revocable trust that includes a provision that says if the ill spouse survives, then some or all of the trust property goes to the Discretionary Testamentary Trust. This avoids any marital election vs. divestment issues for Medicaid purposes.

2. Trust for the sole benefit of the spouse
3. Trust for the sole benefit of a child or grandchild of any age
4. Trust for the sole benefit of any person with a disability under the age of 65 (may work wonders for folks who are not married)

Pitfalls to Avoid in Gifting

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Tax Laws & Medicaid Laws Are Not in Sync

- In 2013, the Federal estate and gift tax exemption amounts are \$5.250 million and the amount will be adjusted annually for inflation.
- The Federal exemption amounts are permanent until they are changed by Congress.
- Some states impose estate and/or inheritance taxes.

Annual Exclusion Gifts

- Individual can give \$14,000 to any individual in 2013 without tax or reporting requirements.
- Spouses can each give \$14,000 to the same individual for total tax-free gift of \$28,000.
- Unlimited inter-spousal gifts may be made to a US citizen spouse without tax or a reporting requirements.
- **BETTER!!!** Annual exclusion gifts are subject to the Medicaid transfer penalty rules...

MEDICAID

Transfer of Assets

- The Deficit Reduction Act of 2005:
 - Extended the look-back period from 36 months to 60 months.
 - Penalty period begins to run after the person is institutionalized and meets the financial and medical criteria for the Medicaid program

MEDICAID

Transfer of Assets

- Penalty period calculated by dividing the uncompensated transfers by the “average” cost of nursing home care (as determined by the Division of Medical Assistance and Health Services). Creates a period of months for which the applicant will be ineligible for Medicaid
- Divisor differs by state. For example, NJ Divisor is \$7,787 in 2013.
- A \$14,000 annual exclusion gift would create a 1.8 month period of ineligibility for Medicaid eligibility purposes in NJ.

MEDICAID

Transfer of Assets

- Transfers (such as caregiver child, disabled adult, or sibling transfer) may be exempt from the Medicaid transfer penalty rules but may result in capital gains to transferee
- In 2013, individuals earning \$36,250 to \$400,000 will have capital gains taxed at a 15% tax rate. Individuals earning over \$400,000 and couples earning over \$450,000 will have capital gains taxed at a 20% tax rate.
- Transfers after death provide a step up in basis resulting in minimal or no capital gains; however, Medicaid recovery rules may foreclose ability to preserve assets for inheritance.

Medicaid

Transfer of Assets ... *Real Property*

- Outright transfer -- transferee receives historical (typically purchase price, plus the value of improvements) adjusted (or “carry-over”) cost basis for capital gains tax purposes and a capital gains tax liability will be triggered when the transferee later sells the property.
- By comparison, if residence is not gifted and passes to the transferee through the estate -- the transferees would receive a capital gains tax free stepped-up adjustment in cost basis to the fair market value at date of death, and would avoid capital gains tax on all appreciation through his/her date of death.

MEDICAID

Transfer of Assets ... *Real Property Subject to a Life Estate*

- May eliminate estate recovery and the requirement to sell (and spend-down the sale proceeds of) the residence
- Reduces (or possibly eliminates) capital gains to transferee provided that the property is not sold until the transferor's death
- **BETTER!!!** The full value of the property is included in the transferor's taxable estate.

MEDICAID

Transfer of Assets .. *Real Property Subject to a Life Estate*

- If residence is sold during the transferor's lifetime = capital gain allocated based on the actuarial value of the life estate at the time of sale.
- For Medicaid purposes: Use actuarial tables relied upon by your State Medicaid Agency. For example, New Jersey relies upon H.C.F.A. Transmittal No. 64 (26 C.F.R. § 20.2031-7).
- For capital gains tax purposes: Use the IRS actuarial table.

MEDICAID

Transfer of Assets .. *Real Property Subject to a Life Estate*

- Medicaid
 - The value of a life estate interest for a 74-year old in the home (in NJ, for example) is valued at approximately 54% of the fair market value of the residence. The remainder interest would be deemed to be owned by the remaindermen and would be valued at approximately 46% of the fair market value of the residence.
- IRS
 - The value of a life estate interest for an 74-year old (in NJ, for example) is approximately 14% of the fair market value of the residence and the remainder interest would be valued at approximately 86% of the fair market value of the residence. Any capital gains and related tax would be allocated along similar lines.

MEDICAID

Transfer of Assets .. *Real Property Subject to a Life Estate*

- 74-yr old applicant sells residence for \$100,000 in the same year gift was made....
- Capital gain to transferee based on 86% ownership interest, but transfer penalty based on 46% ownership interest

LIFE ESTATE		REMAINDER INTEREST	
Medicaid	IRS	Medicaid	IRS
54%	14%	46%	86%
\$54,000	14,000	\$46,000	\$86,000

Medicaid – Transfer of Investment Assets

Transfer of Assets ... *Investments*

- Liquidation of an individual retirement accounts triggers immediate income tax liability. Consult with an accountant before liquidating.
- Brokerage accounts -- consideration should be given to the cost basis, or purchase price, of the investment. Beware of carryover basis.
- Tax on the gain is due if and when the transferee sells the assets.

**THANKS FOR YOUR
ATTENTION!!**