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Cynthia L. Barrett

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Disclaimer and Elective Share in the Medicaid Context

Disclaimers must be handled with care to ensure that they do not harm the public, long-term care benefits provided by the federal Medicaid program. Explored in this article are some disclaimer situations in law practice, as well as various techniques to utilize this estate planning method effectively to avoid forced elective share. How can a client plan for Medicaid and elective-share challenges? Various means are discussed and checklists provided to help in this endeavor.

By Cynthia L. Barrett

Disclaimer of an inheritance or gift (sometimes referred to as renunciation) is a standard postmortem estate planning technique. In traditional estate planning, the disclaimant is treated as though he or she never received the inheritance. That is, the disclaimant is held not to have transferred the inheritance to the eventual taker.

In the debtor-creditor context, "[c]ourts have generally taken the position that a creditor cannot prevent a debtor from disclaiming an inheritance." However, this general rule is being eroded in recent years by cases interpreting the effect of modern fraudulent conveyance law on disclaimer. For example, the Ohio Supreme Court, in a declaratory relief action brought by the personal representative, denied a disclaimer after finding the disclaimant had actual intent to defraud his creditor.

Where the use of Medicaid long-term care benefits is contemplated, disclaimer is a dangerous technique. Use of the standard technique of disclaimer may disqualify the disclaimant and his or her spouse from currently received and future Medicaid benefits. Where the potential disclaimant (or spouse) has medical problems, and may seek public benefits in the foreseeable future to pay medical costs, the attorney considering use of the disclaimer should be aware of recent developments in the Medicaid law.

This article discusses the impact of a disclaimer on only one type of public benefits, long-term care benefits through the federal Medicaid program. Other benefit programs, such as public housing or Medicaid linked to cash assistance programs, are beyond the scope of this article; however, exercise of disclaimer can harm these benefit packages as well.

Cynthia L. Barrett, J.D., is a past president of the National Association of Elder Law Attorneys and a Fellow of the Academy. Her solo practice in Portland, Oregon, is concentrated in the areas of elder law, consumer health issues, and retirement decisions.
Disclaimer as a Medicaid Transfer

Before 1993, whether a disclaimer was a disqualifying transfer for Medicaid purposes was an open question. In 1993, after passage of the federal Omnibus Reconciliation Act (hereinafter OBRA '93), the transfer-of-assets definitions for long-term care Medicaid were broadened so that a disclaimer became a disqualifying transfer. The Health Care Financing Administration (hereinafter HCFA), which administers the federal Medicaid program, expressly declared that “[w]aiving the right to receive an inheritance” is an example of a disqualifying transfer.6

Some states adopted administrative rules explicitly declaring that disclaimer or renunciation of an inheritance constitutes a Medicaid disqualifying transfer. The Medicaid agencies in several states began to deny benefits to disclaimants and their spouses. In 1995, a New York appellate court upheld denial of benefits to a Medicaid recipient who gave up her inheritance.7 The court held that “renunciation of a potentially available asset was the functional equivalent of a transfer of an asset since by refusing to accept it herself, she effectively funneled it to other familial distributees.”8 The court acknowledged that at common law a creditor may not force an individual to accept a gift, yet the court concluded that in the Medicaid context, public policy permits the state to force a Medicaid recipient to accept an inheritance and spend it down.9

Every disclaimer, then, triggers a period of disqualification for Medicaid benefits for the disclaimant and the disclaimant’s spouse. The length of the period of disqualification varies by state. Calculating a period of disqualification is different in each of the 50 states, because each state is permitted to divide the transferred sum by its own state’s average cost of nursing home care. In Oregon, the average cost of care is $3,200, so that a disclaimer of $32,000 would trigger a 10-month disqualification period. In a state with a $7,000 average monthly cost of nursing care, such as New York, the same disclaimer ($32,000) would trigger a four-month disqualification period.

What should the lawyer considering the use of a disclaimer take into account? Ask if the potential disclaimant is a current Medicaid recipient or has a spouse who might need Medicaid. Ask who would pay his or her cost of care, or the spouse’s cost of care, during a period of Medicaid disqualification. If other funds are available to pay the cost of nursing home care for the disclaimant and spouse, perhaps the disclaimer would still be useful.

How should the lawyer proceed if the potential disclaimant is incapacitated and cannot exercise his or her disclaimer right? Where the capacity of the ill person is not clear, the state law on renunciation should be consulted to determine who has the authority to disclaim. The ill person may have planned for incapacity and granted authority to disclaim to an agent under a power of attorney. Typical power-of-attorney language permitting disclaimer is as follows:

To make renunciations or disclaimers, including the power to disclaim or refuse to accept an inheritance, other property interests, and life insurance proceeds, and to waive, release, disclaim or renounce property or an interest therein, or the right of succession therein, including a future interest, in whole or in part.

In some states, the law on renunciation may require permission of a court or a court-appointed guardian or conservator. Complying strictly with the renunciation law and time deadlines is crucial to the disclaimer’s effectiveness, as all estate planners know.

If the lawyer learns that the potential disclaimant is already receiving Medicaid, expect that the disclaimer will be treated as a gift, that is, as a disqualifying transfer. Congress considers those who advise Medicaid disqualifying transfers to be criminals, although a federal judge in New York has enjoined enforcement of the 1997 criminalization statute.10

Where the institutionalized person or spouse, if not already on Medicaid, does not have sufficient resources to privately pay for nursing care during a projected disqualification period, the lawyer should advise against disclaimer.

Disclaimer Situations in the Law Practice

In the routine probate administration, an heir who stands to benefit from the transaction usually raises the issue of disclaimer. The sick heir or frail heir rarely initiates the discussion of disclaimer. In the most complicated scenario, the lawyer is asked about disclaimer by a person who serves as administrator of the estate or trust and is the agent or
guardian for the incapacitated heir and also stands to gain a greater share of the estate if the disclaimer is effected.

Two recent cases from New York and Maryland illustrate how unfavorably the Medicaid administrative agencies and courts are treating disclaimer today. In Molloy v. Bane, the institutionalized Medicaid recipient’s daughter died, and the mother executed a disclaimer of her intestate share of the estate. New York’s Medicaid agency, and its court, treated the disclaimer as a disqualifying transfer. A close reading of the facts in Troy v. Hart illustrates how convoluted a simple disclaimer becomes in the Medicaid context. Troy was the agent under power of attorney for Paul Lettich, an institutionalized Medicaid recipient. Hart was both Lettich’s sister and the personal representative of an estate benefiting both. Hart prepared a disclaimer for Lettich, visited him in the nursing home, and helped him sign the document. Lettich thereby gave up the right to a $100,000 share of the estate. The agent, upon discovering the disclaimer, filed a proceeding to rescind the disclaimer, and incidentally, to remove Hart as personal representative.

The trial court eventually removed the sister as personal representative, but it did not rescind the disclaimer. Lettich died. Troy became personal representative of Lettich’s estate yet appealed the trial court’s decision denying the rescission. The state of Maryland appeared as amicus curiae to try to get the judge to throw out the disclaimer as a violation of public policy. The appellate court affirmed the trial court and found that the disclaimer did not violate public policy simply because it kept the disclaimant on Medicaid. However, the appellate court did not stop there. It also fashioned a remedy for the state that the state had not sought in this dispute between the two personal representatives. The court encouraged Maryland to seek reimbursement of Medicaid benefits paid for Lettich from the other estate heirs by a constructive trust.

The court pointed out that the Medicaid recipient was required to report all changes in financial circumstances within 10 days. Lettich, the sick disclaimant, should have notified the state upon his acquisition of an equitable interest in his sister’s estate. “Lettich had an obligation to ‘pay his own way’ (by means of the inheritance) until such time as his resources were exhausted. To permit disclaimed property to pass to transferees free and clear of any obligation would be a violation of public policy.” The court concluded that the disclaimer was valid, and that the sisters who received the disclaimed $100,000 took subject to the claims of the state of Maryland “for Medicaid benefits improperly paid as a result of Lettich’s failure to inform DSS of his acquisition of property while receiving Medicaid benefits.” The court called for a 10-day notice to the state from a Medicaid recipient contemplating disclaimer in order to give the state a chance to disclaim. “The failure to do so clearly deprives the State of its ability to exercise its rights and may well result in the unjust enrichment of those who surreptitiously dine upon the fruits of inheritance while cloaked by the veil of non-disclosure.”

Disclaimer Practice Checklist

- Does the potential disclaimant now receive public benefits? Review proof of the sorts of benefits and the impact of disclaimer on that person’s eligibility. Who would pay if the state imposed a disqualification period? Which child signed the “personal responsibility” line of the nursing home contract? Who has the obligation to advise the state within 10 days of receipt of assets by the Medicaid recipient? Will the state seek “improperly paid” benefits (those paid after the disclaimer) by direct suit against the other heirs on a constructive trust or other theory?
- If you represent the personal representative, do not let the disclaimant believe you also represent him or her. Refer the disclaimant to another lawyer for advice.
- If the potential disclaimant could be incapacitated, determine who has legal authority to sign the disclaimer document (court, agent, or guardian).
- If the potential disclaimant, or the potential disclaimant’s spouse, might need public benefits for long-term care Medicaid in the next three to five years, because his or her resources would not pay for $4,000 to $7,000 a month in nursing home care during a period of disqualification, make sure the individual receives independent advice about the impact of disclaimer on Medicaid eligibility. Who will pay for care during the period of disqualification? If the disclaimant and spouse have long-
term care insurance, or substantial savings, they are less likely to need Medicaid during a period of disqualification.

**Elective Share and Medicaid**

Some testators expressly disinherit an institutionalized spouse. Unless the disabled spouse seeks the elective or forced share, the assets will pass to the children or other heirs. At common law, the creditors of a surviving spouse may not force the spouse to claim the elective share. Recent cases involving Medicaid and the elective share make it clear that, in some jurisdictions, a surviving spouse's refusal to claim the elective share will cause a period of Medicaid disqualification.

All common-law states, other than the one holdout, Georgia, “grant the surviving spouse the right to renounce a testator’s will and claim a statutory share of the testator’s estate.” Spousal entitlement varies greatly, with some states permitting claims against an “augmented estate” beyond the probate estate.

In the nine community property states, the spouses own equally the property earned by either during marriage. The community property state widow makes a “widow’s election”—to take under the will or to reject the will and retain his or her share of the community property. The term “widow’s election trust” in those jurisdictions has come to mean a trust of all the community property until the death of the widow. Community property state spouses interested in avoiding spend-down of all assets on one spouse’s care sign agreements transmuting community property into separate property, and they may also waive any state right of homestead or separate maintenance rights, if the state law permits such waivers.

**Bypass Planning Is Common Where One Spouse Receives Medicaid**

In elder law practice, the lawyer frequently encounters an estate planning client whose spouse has been institutionalized for nursing care. If the couple protected some assets and the home from nursing home costs by qualifying the ill spouse for Medicaid, the healthy spouse may, and usually does, alter his or her will to bypass the institutionalized spouse to some degree.

Should the healthier spouse unexpectedly die before the institutionalized spouse, the personal representative and heirs usually wonder if the institutionalized spouse will continue to receive public benefits. Inherited assets will disqualify the institutionalized spouse from Medicaid and be spent down for care. Of course, some spouses intend to leave funds for the institutionalized spouse, knowing the spouse will then leave the Medicaid program and pay his or her own nursing costs until the funds are spent down.

If the institutionalized spouse was bypassed to any degree, the lawyer advising the personal representative should consider the issue of the elective or forced share.

**Simple Renunciation by Surviving Spouse**

The lawyer who meets with the personal representative may learn that a spouse who is an heir by intestacy or a devisee under the will is in one of the following situations:

- In a nursing home (then the lawyer should learn who pays for that nursing home care)
- Ill, but not yet in a nursing home (then the lawyer for the estate should be aware that Medicaid might be needed in the foreseeable future).

If the decedent left the surviving spouse some or all of the estate, then an interested person may ask whether the spouse can disclaim.

Does the surviving spouse need separate representation? Who is likely to challenge the disclaimer for the disclaimant’s lack of capacity? Help the personal representative understand the conflict between the interests of heirs who stand to benefit and the disclaimant. Do not let your clients get in the position of the heirs in *Troy v. Hart*, where the court advised the state of Maryland to seek return of the assets by constructive trust suit. Simple disclaimer of an inheritance is a Medicaid disqualifying transfer and will preclude immediate Medicaid eligibility.

**Failure to Claim the Elective Share as a Medicaid Disqualifying Transfer**

If the spouse is completely disinherit or receives less than the elective share under the will, the lawyer should explore whether the state can force the surviving Medicaid beneficiary spouse to elect against the will.

The elective share is a personal right of the surviving spouse, and creditors may not force an
exercise or levy against the elective share. Yet, in the Medicaid context, some courts treat the failure to exercise the elective share as a disqualifying transfer. In several recent cases dealing with the elective share rights of Medicaid recipients, courts permit the state agency to deny benefits to a surviving spouse.

For the purposes of Medicaid eligibility, HCFA defines “assets” to include items that the recipient could get but did not receive due to action on his or her part.

The courts have creatively interpreted the term “action” in the HCFA State Medicaid Manual to include a failure to act. In the lead Medicaid elective share case, the Wisconsin Supreme Court found that failure to assert a claim against a deceased spouse’s estate constituted an “action” within the meaning of the Medicaid transfer prohibitions. In Tannler, Medicaid recipient Phyllis Tannler received nothing in her husband’s will. Mrs. Tannler made no claim against her deceased husband’s estate, and the Wisconsin agency issued a denial-of-benefits notice. She appealed, but the agency decision to cut off benefits was upheld. The personal representative of the estate eventually paid Mrs. Tannler’s forced share (a small sum in this case) to the state of Wisconsin to resolve the case. Substantial assets held in the decedent’s separate name passed to heirs under the will as permitted by Wisconsin’s forced-share and community property laws.

Forcing the Medicaid Recipient to Claim an Elective Share

To force the Medicaid recipient to claim an elective share, the state Medicaid agencies developed two basic approaches:

1. Issue a simple denial-of-benefits notice, and stop paying the nursing home bill; or
2. Petition the probate court for authority to make the claim for elective share on behalf of the ill surviving spouse.

Both of these approaches have been successful.

State Issues Denial-of-Benefits Notice

Whether the institutionalized spouse is incompetent or not, the state Medicaid agency can pressure the recipient to make the election by issuing a denial-of-benefits notice. In most of the cases, the institutionalized spouse is incapacitated and a responsible child or relative is overseeing the Medicaid-paid care. The responsible relative may be the person who benefits from the failure of a spouse to claim the elective share. If the nursing home is not paid, it looks to the responsible relative for payment. Fearing nursing home collection efforts, the responsible relative may simply cave in and arrange to have the elective share paid to the institutionalized spouse.

If the relatives stand immovable and the state denies benefits to the elder, who will be paying for the care? The child or friend who signed the “responsible party” line on the nursing home entrance agreement? Pressure from the care facility to get the bill paid or evict the ill spouse for non-payment may bring the interested persons to the lawyer’s office.

This article will not go further into the interesting issues of relative responsibility for nursing home care, the enforceability of responsible party nursing home admission agreements, or the nursing home transfer prohibitions. But where the relatives do not pay, and the state continues to pay on “hardship” theory after a disqualifying transfer, the state could conceivably sue the relatives who benefit from the transferred property for “improperly paid benefits” under some state statutes.

State Involves Probate Court to Make Election

In Ohio, a probate judge sua sponte elected a spousal share for an incapacitated surviving spouse, as permitted by the state elective share statute, to take the surviving spouse off Medicaid benefits. In 1996, the Ohio Supreme Court upheld the trial judge’s exercise of the spouse’s election. In that case, the court relied solely on Ohio administrative regulations to find that the surviving widow had a legal interest in her right to take against the will. The decedent had left his entire estate to his son from a first marriage. The probate judge appointed a commissioner to investigate, and concluded that election to take against the will was necessary for the surviving spouse’s future support.

In Oregon, the state nominates a private attorney to be appointed as conservator of the institutionalized surviving spouse. The conservator claims the protected person’s elective share. Where the state chooses to seek appointment of a conservator, the family can oppose the state strategy using two arguments: (1) upon petition for appointment of a
conservator, the family members can object to appointment of a nonrelative whose interests are solely those of the state, not those of the incapacitated person; and (2) the family can argue that the surviving spouse's circumstances would not be altered or improved if the elective share were to be exercised. In most cases, the ill surviving spouse remains in the same bed at the same nursing home receiving the same level of care whether the bill is paid from the inheritance or from public benefits. In a pre-OBRA '93 New York transfer case, the court denied a petition to claim an elective share where no actual improvement in care or benefit to the impaired spouse would have resulted.

Oregon has no reported cases on this technique—all of these cases to date have been resolved by settlement (many by payment of some part of the elective share to the state-nominated conservator, who spends it down for care).

In a post-OBRA '93 transfer case, a New York court ruled that a guardian was deemed to have exercised a recipient's right of election against the estate of a deceased husband to the extent needed to provide for the recipient during a period of ineligibility. The best interests of a ward are irrelevant if the state can get a court to rule that the guardian is “deemed” to make the election.

Use of Revocable Trust to Get Around Elective Share Backfires

In a very recent reported decision from Connecticut, the court strongly criticized the avoidance of probate by use of a revocable living trust to bypass the Medicaid recipient spouse. In Connecticut, the surviving spouse can elect only against the probate estate.

Charles Bezzini, ill with prostate cancer, established and funded a revocable living trust in March 1993. The trust contained no provisions benefiting Mrs. Bezzini. On June 3, 1993, Mr. Bezzini died. Four months later, Mrs. Bezzini went to a nursing home. In February 1994, eight months after her husband died, Mrs. Bezzini applied for Medicaid benefits. The agency found that a Medicaid disqualifying transfer occurred on June 3, the date of death, when the sons became entitled to $469,142.80 as sole beneficiaries of the husband's revocable trust.

The Connecticut Appeals Court agreed with the state agency, remarking that had the husband transferred his property by will, no disqualifying transfer would have occurred, and Mrs. Bezzini would have been entitled to her elective share. Connecticut permits the elective share only against the probate estate, not an augmented estate. Because a revocable trust was used, rather than a will, an actual transfer of an interest of the spouse occurred on the date of death, when the trust became irrevocable and the trustor's interest was extinguished. Use of the trust to bypass the spouse and benefit the children backfired. Mrs. Bezzini, who did not apply for benefits until a year after her husband created his trust and eight months after he died, was disqualified for Medicaid benefits.

Connecticut practitioners now ask questions such as the following: If the ill wife fails to elect, is that a disqualifying transfer of assets? If the spouse leaves the ill spouse an income interest in a trust containing the family home, would mandatory payment of the rental income to the wife prevent the state from claiming a disqualifying transfer?

Planning for Medicaid and an Elective Share Challenge

In light of the harsh reaction of courts to the complete disinherition of the surviving spouse, the elder law attorney rarely advises the client to completely bypass an ill spouse who may become eligible for Medicaid. Where one spouse is ill and on Medicaid, the elder law attorney may simply suggest that the client leave the elective share outright to the ill spouse.

However, some elder law attorneys are being more creative.

Waiver of Elective Share by Prenuptial or Postnuptial Agreement

Of course, some spouses may waive elective share rights in prenuptial or postnuptial agreements. Elective share waivers in prenuptial and postnuptial agreements are enforceable. However, at least one court in New York deemed execution of a postnuptial agreement waiving the elective share to be a disqualifying transfer.

The New York Medicaid administrative agency issued a denial of benefits to Jeanette Dionisio, declaring that her execution of a waiver of elective share (two weeks before entering a nursing facility and 20 months before applying for Medicaid) was
a disqualifying transfer. In a very unusual twist, the agency found that the period of disqualification began with the date of death, not the date the waiver was signed.

Jeanette Dionisio executed a waiver of her right to receive any property or assets from the estate of her husband two weeks before she entered a nursing facility, and approximately 20 months before applying for medical assistance. When her husband died testate four months after she entered the facility he left an estate valued at $469,500, and he had made no provisions in his will to provide for his wife. Mrs. Dionisio's share of her husband's estate would have been one-third, or $156,500. The Westchester County Department of Social Services ultimately denied Mrs. Dionisio's application for medical assistance on the ground that, by waiving her marital rights to a portion of her husband's estate, she had transferred resources for the purpose of qualifying for medical assistance. Mrs. Dionisio died after this determination was made.

The estate argued that the postnuptial waiver fit an exception to the regular Medicaid transfer restrictions, in that it occurred solely for regular estate planning reasons, and not for the purpose of divestment of assets to qualify for Medicaid. However, the court held that a presumption existed that the postnuptial waiver of elective share was for Medicaid qualification purposes, and further found that the personal representative had not rebutted that presumption in the hearing.

In the Medicaid context, transfers of assets made "exclusively for a purpose other than to qualify for medical assistance" are not disqualifying. Waivers executed long before an illness, as part of normal estate and marital planning, should withstand scrutiny. When conventional postnuptial agreements are done, which typically include waivers of elective share, practitioners might document in the agreement all of the consideration, so that the estate planning (non-Medicaid) reasons are apparent on the face of the document.

How will a state's Medicaid agency, interested in forcing the Medicaid recipients to exercise their elective shares, learn about the recipient's inheritance after death of a spouse? Each state will gather facts differently, but the estate or trust administration advisor should anticipate the inquiry.

If an elective share waiver is a Medicaid disqualifying transfer, when does the disqualification period commence? Does the Medicaid disqualification starting date wait until death, as in Dionisio?

Some planners suggest that the mutual waivers of the elective shares be for consideration other than mutual promises. Some also suggest the consideration be creation of an elective share trust, of one of the varieties below, in the will of each spouse.

**Creating an Elective Share Trust in the Will**

Once an ill spouse has qualified for Medicaid, the healthier spouse usually reconsiders his or her own estate planning. If the institutionalized spouse is disinherited, or receives insufficient assets to fully fund the elective share, then the estate risks an elective share claim. In Oregon, the elective share is reduced by the value of what is given under the will to the surviving spouse. In some states, such as New York, the spouse can reject what the will gives and claim the share outright.

Public policy does not favor disinheritance of spouses. In Utah, disinheriting the spouse is discouraged—the omitted spouse gets the intestate share unless the testator provides for the spouse with other assets, or the testator declares in the will itself that his or her spouse was intentionally omitted. Many of our clients agree with this public policy and do not want to completely disinherit the surviving spouse.

Some of my clients with sick spouses on Medicaid leave all of their estates to the ill spouse, knowing that the inheritance will disqualify the survivor from public benefits but intending that the inheritance be used to pay the sick spouse's hospitals, nursing homes, care managers, and other care providers. The well spouse's estate plan should, of course, include a spousal trust to provide management of assets or income left to the institutionalized spouse.

Healthier spouses may, however, leave only part of their preserved resources to the ill spouse. If the healthier spouse has revised his or her estate plan to bypass the institutionalized spouse, and leave his or her estate to the children, the elective share rights of the institutionalized spouse may be used by the state as a method of taking control of new assets for spend-down on care costs.

The manner in which the elective share is satisfied will be different in each state. For example, in Utah the electing spouse must allow credit against the share for all sums received by him or her on
account of the death of the spouse, including
entireties real estate and life insurance. The lawyer should carefully examine the elective share law of the state(s) where assets are located, and consider drafting a trust for just the elective share amount of the probate or augmented estate. Elder law attorneys are calling testamentary trusts drafted in light of the elective share a “right-of-election trust.” These right-of-election trusts could be full support, completely discretionary, income only, or special needs in nature.

The right-of-election trust could be a full-support spousal testamentary trust, intended to be spent down entirely on nursing and other medical care, without regard to public benefits eligibility. This sort of trust can be written with instructions to disregard the interests of remainder beneficiaries. The right-of-election trust could be a fully discretionary trust, but this sort of trust is difficult to value, and its value would not completely offset the elective share. Alternatively, it could restrict payments in some way, and not be drafted as a full-support trust. In Virginia and New York, a form of income-only right-of-election trust is sometimes used.

Virginia practitioner Andrew Hook drafts wills for the community spouse leaving an income-only trust to the ill spouse, which also permits discretionary principal distributions for special needs. In 1997, New York practitioner Vincent Russo suggested using a right-of-election trust, funded with all or part of the estate, to provide income only to the ill spouse, which also permits discretionary principal distributions for special needs.

In 1997, New York practitioner Vincent Russo suggested using a right-of-election trust, funded with all or part of the estate, to provide income only to the ill spouse. As Russo pointed out in his practice guide, the trust income will pay for part of the care, reducing the payout by the Medicaid agency. The Medicaid agency is less likely to claim the elective share if the decedent’s estate plan reduces the use of public funds for the surviving spouse’s support. However, the New York spouse may simply elect completely against the will, taking 33 percent of the assets, and the right-of-election trust will never be implemented. In 1999, New York denied benefits to an ill spouse who was the beneficiary of a right-of-election income-only trust. The effectiveness of the right-of-election trust in New York is unclear.

The income-only right-of-election trust would produce excess income in income cap states such as Oregon. While excess income can be managed currently with an income cap trust, preserving benefits while reducing the use of tax dollars, in Oregon I have been developing a special-needs right-of-election trust. The special-needs trust (hereinafter SNT) is funded with the elective share amount. The trustee is required to use income for special needs and also has discretion to use principal for special needs.

I have found that my clients routinely execute new wills after a spouse is institutionalized. More than half of my clients have chosen to leave the elective share amount in Oregon (25 percent) to a special-needs trust for the spouse. However, the right-of-election trust in special-needs format does not guarantee that the state will not claim the elective share.

A spousal trust in any form (full support, income only, or special needs) pleases the clients, who want the children rather than a state-nominated conservator to determine how the inheritance is spent. Should the state seek appointment of a conservator for an institutionalized spouse after the death of the community spouse, this SNT design permits the personal representative to argue that simply spending down an elective share for the $4,000-a-month nursing home bill will not benefit the ill surviving spouse as much as special-needs expenditures, and that the SNT should be valued and kept in place instead of an outright inheritance and spend-down. I am investigating valuation of the mandatory income SNT. Evaluate the state elective, state statute, or common-law valuation methods in your own state.

For valuation purposes, if the Medicaid recipient spouse is given all right to income and the power to appoint who will receive the remainder, then 100 percent of the value of the trust will be considered in computing the elective share. But I am reluctant to give the power of appointment to an incapacitated person, because that might expose the trust remainder to Medicaid estate recovery under Oregon’s expanded estate recovery statute, or its successor, at some point in the future. I leave the power of appointment out of the right-of-election trust currently, but I am giving that issue further study.

Should the state wish to appoint a conservator to claim the elective share, the personal representative will argue that the will already leaves the ill spouse a 25 percent elective share special-needs trust. If the state is successful in forcing an election, then the amount of cash to be paid will be reduced by the value of the SNT.
I have not yet had to value a special-needs right-of-election trust in the crucible of litigation. However, if the trust is valued at less than 25 percent (the elective share amount in Oregon), then additional resources may be paid to the state’s nominated conservator to make up the full elective share. The conservator will spend down the additional resources for nursing care and other needs, and when the ill spouse goes back on Medicaid, the special-needs trust will be available to supplement the public benefits.

Because the special-needs right-of-election trust is contained in a will, and is not part of a living trust, it need not have the OBRA ’93 payback provisions, and is not subject to OBRA ’93 trust rules that count all principal as an available asset of the grantor or spouse.

However, I want to caution the readers that nothing is certain in the Medicaid setting. I learned of an unreported New York case, where the healthier spouse in consideration of the waiver of elective share left a portion of the estate in an SNT for the institutionalized spouse. The state ignored the SNT and issued a denial notice. The elder law practitioner argued, unsuccessfully, that no transfer penalty should be imposed because the value of the asset transferred at the time the waiver was signed was uncertain. The trial court upheld the agency’s denial and imposed a disqualification period on the Medicaid beneficiary spouse beginning with the date of death. This case was eventually settled before hearing on appeal, so no reported decision was issued.

Elective Share Practice Checklist
1. In estate administration, is a spouse receiving less than the elective share?
2. In estate planning, is one spouse ill and likely to need Medicaid assistance with nursing home care?
3. In estate administration, is a spouse disabled and likely to need (or already receiving) public benefits? If a renunciation of an inheritance is considered, review the law on disqualifying transfer in this article and give the renouncing spouse (or his or her fiduciary) independent advice about the impact on public benefits and the additional possibility of forced elective share.
4. How does the state where the ill spouse now lives, or the states where he or she might live if moved to be nearer other relatives, treat the failure to claim an elective share?
5. In estate planning, do not recommend that your client totally disinherit a disabled spouse—consider the impact of the elective share claim on the disabled spouse’s public benefits (if needed). Who will pay for the care if the state denies benefits during the transfer penalty period of disqualification?
6. Where the spouses are entering into a postnuptial or prenuptial agreement, be explicit about the waiver of elective share. However, the other estate planning goals that are relevant to the clients’ situations should all appear on the face of the agreement. When one spouse is already ill, understand that a simple waiver of elective share might fall under the definition of a Medicaid disqualifying transfer if the state determines that the waiver’s purpose was to shift the burden of a surviving spouse’s nursing care cost from other heirs to the state.

Form of Special-Needs Right-of-Election Trust
(drafted in light of Oregon law)

DISCLAIMER: The following form is not warranted as suitable except to illustrate concepts discussed in this article, and may not be appropriate for any general or specific use. The user is responsible for determining how the form should be adapted to any particular situation.

3.2 INSTITUTIONALIZED HUSBAND TESTAMENTARY SPECIAL NEEDS TRUST. I give to the trustee, in trust, for the benefit of INSTITUTIONALIZED HUSBAND, one-fourth of the value of my net estate reduced by the value of the following property:

3.2.1 Property given under this will, including the present value of legal life estates property given outright, if any, and

3.2.2 The property not passing under the will but received by INSTITUTIONALIZED HUSBAND on account of my death in any form of ownership with right of survivorship, including joint annuities, life insurance, life estates, and jointly held real and personal property.

My trustee shall administer those net estate funds for the benefit of my disabled husband, INSTITUTIONALIZED HUSBAND, for the
spouse’s special needs, as a supplement to any public or private benefits which might be available to meet the basic needs of INSTITUTIONALIZED HUSBAND, according to the purposes and plan set forth below in ARTICLE 6. The trust may be known as the INSTITUTIONALIZED HUSBAND TESTAMENTARY TRUST, and shall be administered as set forth below.

ARTICLE 6

INSTITUTIONALIZED HUSBAND SPECIAL NEEDS TESTAMENTARY TRUST

6.1 PURPOSES OF TRUST. It is the intention of the trustor to create a purely discretionary supplemental and emergency fund for the benefit of the beneficiary, and not to displace any assistance that might otherwise be available from any public or private sources. In the event the beneficiary is unable to maintain or support himself independently, the trustee may seek support and maintenance for the beneficiary from all available public and private resources. The trustee shall take into consideration the applicable resource and income limitations of any public assistance program for which the beneficiary is eligible. In carrying out the provisions of this trust, the trustee shall be mindful of the probable future special and supplemental needs of the beneficiary, but not of the remainder beneficiaries. The trustor intends that the trustee increase the choices available to the beneficiary so that the comfort and personal dignity of the beneficiary are enhanced by trust expenditures.

6.2 NO DISTRIBUTION FOR FOOD, CLOTHING, AND SHELTER. The trustee is not authorized to make trust distributions for basic food, shelter, and clothing for the beneficiary.

6.3 SUPPLEMENTAL NEEDS DISTRIBUTION. The trustee shall distribute to or apply for the benefit of INSTITUTIONALIZED HUSBAND for the spouse’s lifetime all the net income, and so much of the principal up to the whole thereof as the trustee may determine, in his or her sole discretion, to be advisable for the satisfaction of INSTITUTIONALIZED HUSBAND’s special non-support supplemental needs. All net income should be distributed annually for the special needs of my spouse. However, any net income inadvertently not distributed shall be added annually to principal. It is the intention of the trustee that the trustees disburse funds from this trust only for non-support needs. However, the trustee may choose which non-support needs to meet, in the trustee’s sole discretion, from the many possible expenditures which will maintain the beneficiary’s health, safety and welfare when such requisites are not being provided by the public or private resources available to the beneficiary, or are not otherwise being provided using the income available to the beneficiary. The trustee shall make no payments for services or products benefiting the beneficiary if the trustee shall determine that payment for the services and products is the obligation of any county, state, federal or other governmental agency which has a legal responsibility to serve persons with disabilities which are the same or similar to the impairments of the beneficiary.

6.3(a) The trustor does not intend to displace any source of income otherwise available to the beneficiary, for basic support such as food and shelter, including any governmental assistance program to which the beneficiary is or may be entitled. This trust is not intended to be a resource of any beneficiary, and is not available to the beneficiary. It is intended that a spendthrift trust be created for non-support purposes. No part of a corpus or income of this trust may be used to supplant or replace any public assistance benefits received by or through any county, State, Federal or other governmental agency.

6.3(b) To the extent that public benefits are not made available to the beneficiary for other than basic living expenses, including food and shelter, the trustee may disburse for the benefit of the beneficiary such amounts from the income or principal of this trust up to the whole thereof, for the satisfaction of the following types of supplemental needs:

- Health insurance premiums
- Dental care
- Plastic or cosmetic surgery or other medical care considered not medically necessary by insurers or benefit programs
- Psychological support services
- Recreation and transportation
- Differentials in costs between housing and shelter for shared and private rooms
- Supplemental nursing care and similar care which public assistance programs may not
otherwise provide, including payments to those providing services in the home

- Telephone, communication and television services
- Mechanical bed or other furniture with therapeutic potential
- Periodic outings and vacations
- Companions’ expenses for travel, reading, driving, and recreation or cultural experiences
- Hair and nail care
- More sophisticated medical, dental or diagnostic treatment, including experimental treatment, for which there are not funds otherwise available
- Private rehabilitative training
- Payments to bring in family and friends for visitation if the trustee deems that appropriate and reasonable
- Private case management to assist the beneficiary, or to aid the trustee
- Medication, drugs or treatment prescribed by a physician or other healing art practitioner for which there are not other funds available
- Fees and Costs for Protective Proceedings or Criminal Proceedings

Expenditures for the above or other supplemental needs shall be made only if public benefit programs do not provide them, and only if the trustee determines in the trustee’s sole and absolute discretion to allow them. The above list is intended to be illustrative and not inclusive of all kinds of non-support disbursements that would be appropriate for the trustee to make. It is important to the trustor that the beneficiary maintains a high level of dignity and receives humane care.

6.4 SUPPLEMENTAL INCOME PAYMENTS TO THE BENEFICIARY (AMOUNTS LESS THAN DISQUALIFYING INCOME FOR PROGRAMS). The trustee may pay to or apply for the benefit of beneficiary’s basic support needs such amounts from the income of the trust as the trustee may deem advisable, but in any event not more than the sum which, when combined with other income from other sources for the beneficiary, would exceed the income standard of the public benefit programs for which beneficiary may qualify. For example, under regulations in effect at time of execution of this will (1997), to qualify for basic Medicaid as an SSI recipient, the individual may have no more than $470 monthly income; to qualify for home and community-based waiver and nursing facility care, the individual may have no more than $1,452 per month income from social security, pension and other sources. In no case shall payments be made directly to the beneficiary if receipt of income will disqualify the beneficiary from public benefits otherwise available to him, using then-current payment standards.

6.5 PURCHASE OF EXEMPT ASSETS AND TRANSFER TO BENEFICIARY. The trustee may purchase items for the use of the beneficiary that would be considered “exempt” assets for purposes of public benefit law, such as personal household items, transportation devices, medical equipment, or a home. The trustee may, in his or her sole and absolute discretion, distribute such exempt items to the beneficiary. Once distributed, such items are free of trust and the trustee need not account for them; the trustee must report such distributions in the following regular accounting.

6.6 AUTHORITY TO INITIATE PROCEEDINGS FOR ELIGIBILITY. In determining whether the existence of this trust has the effect of rendering the beneficiary ineligible for any program of public benefit, the trustee is hereby granted full and complete discretion to initiate action to render the beneficiary eligible for any such program or public benefit, and is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility. All costs relating thereto, including reasonable attorney fees, shall be charged to the trust. Should the trustee be requested to pay for equipment, medication or services which publicly funded organizations or agencies are authorized or expected to provide, the trustee shall deny such request. The trustee is directed to defend, at the expense of the trust estate, all contest or attacks of any nature against the trust, and has authority to settle or compromise such claims if the settlement terms are not inconsistent with the trustor’s intent.

The trustee may cooperate with any guardian, conservator or authorized representative of the beneficiary to seek support from all available resources, including but not limited to public programs and private programs, if the trustee determines that the guardian or authorized representative is acting so as to effect the intent of the trustor. Any expense of the trustee, including reasonable attorney fees, shall be a proper charge to the trust.
6.7 PREFERENTIAL RIGHTS OF BENEFICIARY. The supplemental needs of the beneficiary, if such can be met within the terms of this trust, are preferred to the rights of any remainder beneficiary. The trustee may distribute all income and principal of the trust, leaving nothing for remainder beneficiaries, in order to accomplish the trust purposes.

6.8 TRUST NOT AVAILABLE FOR SUPPORT OF DEPENDENTS. The trustee shall in no event make distributions for the support of any dependents of the disabled beneficiary.

6.9 NONASSIGNMENT/SPENDTHRIFT. No interest in the principal or income of this trust shall be anticipated, assigned or encumbered, or be subject to any creditor's claim or to legal process. Furthermore, because this trust is to be conserved and maintained entirely for the special needs of the beneficiary, no part of the corpus hereof, nor principal, nor undistributed income, shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services including residential care, by any private or public entity, office, department or agency of any state, or of the United States or any other governmental agency. No beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner anticipate or dispose of his or her interest in the trust or the income produced thereby, prior to its actual distribution by the trustee for the benefit of the beneficiary in the manner authorized by this agreement. No beneficiary shall have any assignable interest in any trust created under this agreement or in the income therefrom. Neither the principal nor the income shall be liable for any debts of the beneficiary. The limitations herein shall not restrict the exercise of any power of appointment or disclaimer.

6.10 NEW YORK RESIDENCY. Should the beneficiary live in the state of New York, or in a state with restrictions on trusts such as New York, then I direct that the provisions of Section 7-1.6 of the Estates, Powers and Trusts Law of the State of New York, or any similar or successor statute thereto, shall not be available to require any invasion of trust funds by the trustee or any court.
assets in the name of the trust, and a copy of the most recent trust tax return shall be attached to the accounting.

7.5 INDEMNIFICATION. The trustee may require indemnification to the trustee’s satisfaction at the cost of the trust, before accepting the trust or taking any step authorized hereunder.

7.6 RULE AGAINST PERPETUITIES. Despite any other provision of this instrument, the trust shall terminate and be distributed as if it had been terminated in accordance with its terms not later than 21 years after the death of the beneficiaries named in this instrument who are living at the time of exercise of any special power of appointment, or if not exercised, then at the time of the death of the second of the grantors to die.

7.7 TRUSTEE PROTECTION SO LONG AS TRUSTEE ACTS IN GOOD FAITH. In administration of the special needs trust, trustor recognizes that the trustee is not licensed nor skilled in all possibly relevant fields including medicine, social services, investment management, and public benefits law. The trustee may seek the counsel and assistance of experts, at the cost of the trust, and of the beneficiary’s guardian or conservator, if any, and any State and local agencies that have been established to assist the disabled in similar circumstances as the beneficiary. The trustee may use these resources to aid the beneficiary, or the beneficiary’s guardian or conservator, as appropriate, in identifying programs which may be of social, financial, or developmental assistance to the beneficiary. However, the trustee shall not in any event be liable to the beneficiary, the remainder beneficiaries of the trust, or any other party for the trustee’s acts so long as the trustee acts in good faith. For example, the trustee and the beneficiary’s guardian or conservator, if any, shall not be liable for the failure to identify each program or resource that might be available to the beneficiary because of disability.

7.8 NO COMMINGLING OF ASSETS. Public assistance benefits of any beneficiary of this trust shall not be commingled with trust assets but shall be separately held by the trustee, should the trustee be a payee or the recipient of those benefits. Nothing in this provision shall be construed to require the addition to the trust estate of public assistance benefits received by, or on behalf of, the beneficiary.

7.9 TRUSTEE DECISION FINAL. Under no circumstances can any beneficiary compel a distribution from the trust for any purpose. The trustee’s decision in choosing among particular non-support disbursements is final as to all interested parties, even if the trustor elects to make no disbursements at all. The trustee’s sole and independent judgment, rather than any other person’s determination, is intended to be the criterion by which disbursements are made. No judge or any other person should substitute judgment for the judgment of the trustee.

7.10 TERMINATION. Unless sooner terminated as described below, the trust shall terminate upon the death of the beneficiary.

7.10(a) TERMINATION OF TRUST BASED ON ADMINISTRATIVE COST. If the trustee shall determine, in the trustee’s sole and absolute discretion, that the market value of the trust is so small compared to the costs of administration that continuing the trust will defeat or substantially impair its purposes, the trustee may terminate the trust and distribute the remainder of the trust property including any accrued and undistributed net income outright as though the beneficiary had died.

7.10(b) TERMINATION UPON INELIGIBILITY OF BENEFICIARY. In the event the existence of this trust for special and supplemental needs of INSTITUTIONALIZED HUSBAND in any respect has the effect of rendering the beneficiary ineligible for Supplemental Security Income (SSI), or Medicaid or any other benefit or entitlement provided by any public agency, office or department of the State of Oregon, or any other State of the United States or of the Federal Government, the trustee is directed to TERMINATE THIS TRUST and the undistributed balance of the trust estate, including any accrued and undistributed net income, shall be distributed in the same manner as if the beneficiary had died.

7.10(b)(1) It is the trustor’s wish that thereupon the distributees shall conserve, manage and distribute the proceeds of the former trust estate for the benefit of the beneficiary, but this request pertaining to management of trust proceeds and trust distribution after the termination of the trust is precatory, not mandatory.
7.10(b)(2) In determining whether the existence of the trust or trustee's powers has the effect of rendering said beneficiary ineligible for any State or Federal public benefit, the trustee is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility, and all costs relating thereto, including reasonable attorney fees, shall be a proper charge to the trust estate.

7.11 DISTRIBUTION UPON TERMINATION. Upon termination of the trust, the trust shall be divided into equal shares, one share for each child of mine who is then living and one share by right of representation for the then surviving lineal descendants of each deceased child.

7.11(a) A share established for a surviving child of mine shall be distributed forthwith to the child.

7.11(b) If a child has died before termination, leaving lineal descendants, the deceased child's share shall be distributed in equal shares to the lineal descendants, who shall take by right of representation.

7.12 GENERAL TRUSTEE POWERS. The trustee shall have all powers permitted by Oregon law to trustees, except where the exercise of such powers will conflict with the trust purposes or with the special administrative powers or restrictions described in this article.

7.13 TRUST AMENDMENT. Trustor grants the trustee the power to amend this Trust Agreement to ensure that trustor's purposes are met and that this trust is not considered a resource or income so as to disqualify the beneficiary from state or federal assistance. The trustee may not, however, alter the remainder beneficiaries of the trust. If the trust cannot be modified or amended to prevent its existence from disqualifying the beneficiary from public benefits, then the trustee shall terminate the trust as if the beneficiary had died.

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**Endnotes**


4. See, e.g., Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI).

5. See 42 U.S.C. § 1396p(c).


8. Id. at 913.

9. See id.


12. 631 N.Y.S.2d at 910.

13. The judge took umbrage, and his attitude is revealed in the final words of the opinion, where he seeks to avoid “the unjust enrichment of those who surreptitiously dine upon the fruits of inheritance while cloaked by the veil of non-disclosure.” Troy v. Hart, 697 A.2d 113, 119 (Md. Ct. Spec. App. 1997).

14. See id.

15. See id. at 118.

16. Id.

17. Id. at 119.

18. Id.

19. CASNER & PENNELL, ESTATE PLANNING, § 3.4, at 3-260 (6th ed. 1998). This book contains an excel-
lent description of how the elective share operates, and I highly recommend it.


22. Private communication from community property practitioners Janine Lawless, Seattle, Washington; Peter Stern, California (where the court can enter such an agreement for an incapacitated spouse); Robert Fleming, Tucson, Arizona (where failure to assert the claim to a statutory allowance is a disqualifying transfer by regulation).

23. 697 A.2d at 119.


27. Examples of such action (including waiver of an inheritance) are given in HCFA Transmittal No. 64, STATE MEDICAID MANUAL, pt. 3, § 3257.B (3). Eligibility, November 1994, reprinted in MEDICARE & MEDICAID GUIDE (CCH) ¶ 14,311.81 (March 20, 1997).

28. See Barbara Hughes, Tannler Decision Interprets “Action,” STATE BAR OF WISCONSIN, Fall 1997, at 15–18 (citing Tannler v. Wisconsin Dep’t of Health and Social Services, 564 N.W.2d 735 (Wis. 1997)).

29. Private correspondence from Wisconsin attorney Paul Sturgel.

30. See Tannler v. Wisconsin Dep't of Health and Social Services, 564 N.W.2d 735 (Wis. 1997) (issuing a denial notice).

31. See In re Estate of Cross, 664 N.E.2d 905 (Ohio 1996).

32. See In re Street, 616 N.Y.S.2d 455 (N.Y. 1994).


34. See Bezzini v. Dep’t of Social Services, 715 A.2d 791 (Conn. App. Ct. 1998).

35. See id.

36. See id.


40. See id. at 905.

41. Id.

42. See 42 U.S.C. § 1396p(c)(2)(C).

43. Id.

44. See Utah Code Ann. § 75-2-203.


46. Private communication from Andrew Hook, Virginia lawyer.

47. VINCENT RUSSO & MARVIN RACHLIN, NEW YORK ELDER LAW PRACTICE, § 16.4 at 708 (West 1997).


49. In many elder law situations, although attempts are made to place most assets into the name of the community spouse at the time the institutionalized spouse goes on Medicaid, some assets (especially beneficiary designation sorts of assets such as IRAs, pension rights, life insurance, and a joint account) will pass to the Medicaid recipient spouse at death. These sums passing at death outside of probate can limit the elective share amount in Oregon. See, e.g., Or. Rev. Stat. §§ 114.105(1), 114.125.

50. This sample form of SNT is not a parking lot for assets, to preserve them for the children. If your client wants a parking lot, you should not include the bolded language or Article 6.7 below. My clients seem to want the trust used for the ill...
spouse. I want to be able to argue that the SNT will benefit the elder more than a cash-out spend-down of the inheritance by the state's nominated conservator in an elective share fight.

51. See Russo & Rachlin, supra note 47, at 747–48; this provision is an example of the sort of special drafting necessary to make the trust work in the state where a beneficiary may live. Do not do cross-state planning without consultation with an attorney in the states where the children might move the elder, or where the elder intends to retire.