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THE MARITAL WILL DILEMMA IN MEDICAID PLANNING

By Dana E. Bookbinder, Esquire

Complete asset protection planning entails a careful review of both spouses' wills. Particularly, the healthier, or community spouse's will often must be redesigned to avoid the possibility of jeopardizing or interrupting the public benefits eligibility of the other spouse.

If an institutionalized spouse is named as beneficiary of his spouse's will (or life insurance policy, annuity, IRA, etc.), he risks losing eligibility for public benefits in the event his spouse predeceases him. However, current Medicaid law considers omitting a spouse who is a Medicaid applicant (or recipient) from the will of his spouse as an uncompensated transfer of assets subject to penalties upon the death of the other spouse. Under State law, a spouse who is a Medicaid applicant or recipient must at least receive an amount equal to a spousal elective share from his deceased spouse's estate.

New Jersey's current elective share act, made effective May 1, 1982, entitles an individual who has been disinherited by his or her deceased spouse (or who has received less than the amount to which he or she is entitled by law) to claim a share of the estate of the deceased spouse despite the disinheritance. The elective share is provided for in the New Jersey statutes at N.J.S.A. 3B:8-1. The amount to which the surviving spouse is entitled is equal to one-third of the deceased spouse's augmented estate,¹ provided that circumstances did not exist as of the time of the deceased spouse's death that would have been adequate to support an action for divorce.

The augmented estate¹ includes all assets that had been in the deceased spouse's name reduced by funeral costs, administration expenses and creditor claims. Assets contained in a Living Trust are included in this total, but life insurance is not.

The disinherited spouse may initiate an action to take an elective share by filing a complaint in Superior Court within six months of the appointment of a personal representative of the decedent's estate. The right of election can only be exercised by the disinherited spouse during his or her lifetime. It cannot be exercised by the spouse's own beneficiaries or by a creditor on behalf of the spouse.

For elective share purposes, a life interest in trust for the benefit of the surviving spouse, by law, is valued at one-half the total value of the trust, or if less than the full amount of the trust is subject to the spouse's life interest, then the spouse's interest is calculated at one-half of the portion of the trust subject to the life estate. Therefore, if one spouse dies, leaving at least two-thirds of his entire estate for elective share purposes in trust for his surviving spouse, the surviving

spouse=s elective share is satisfied. If an individual leaves his entire estate to his spouse in trust, the surviving spouse will receive more than the elective share to which he or she is entitled.

One possible solution to address the dilemma between leaving assets directly to the prospective Medicaid recipient and omitting him entirely is to design the will of the community spouse so that it leaves the minimum amount necessary to satisfy the elective share right of the ill spouse. As an alternative, the community spouse=s will can also be designed to place assets in a protected trust for the ill spouse. Trusts that can preserve Medicaid benefits include special needs trusts, discretionary trusts and testamentary income only trusts. Upon the death of the ill, surviving spouse, the assets in the trust would be able to pass to the children or other remainder beneficiaries. In recent years, the State of New Jersey has inconsistently challenged testamentary discretionary and special needs trusts. No legislation has been enacted which would indicate that such trusts would be ineffective for Medicaid planning purposes, however. Whether the trust assets are insulated from countability under Medicaid rules can depend upon the precise terms of the trust. Careful drafting and keeping up with legal changes are especially important in this area.



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

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