WHAT REAL ESTATE ATTORNEYS NEED TO KNOW ABOUT WILLS AND PROBATE

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EDUCATION

J.D. Degree (magna cum laude), St. Mary's University School of Law, 1990
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PROFESSIONAL ACTIVITIES

Of Counsel, Schoenbaum, Curphy & Scanlan, P.C., San Antonio, Texas

Adjunct Professor of Law, St. Mary's University School of Law (1998 to present)

Co-Chair, Long Term Care, Medicaid and Special Needs Trusts Committee of the Real Property, Trusts & Estates Section of the American Bar Association (2010-2013)

Member, National Academy of Elder Law Attorneys (national and state chapters)(State Board of Directors, 2000 to 2006, 2009 through 2012, Texas Chapter President 2004-2005)

Member, Special Needs Alliance

Member of the College of the State Bar of Texas (1997 to present)

Member of the American Bar Association, State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers Association and San Antonio Trial Lawyers Association

Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)

Planning Committee Member, State Bar of Texas, Elder Law Course (2000, 2001, 2003-2008, 2013-2015)

Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)

Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference (1999 to present)

Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)

Listed in the 2011 Inaugural Edition, Martindale-Hubbell Bar Register of Preeminent Women Lawyers (and in 2012-2014)

Listed in *Best Lawyers in America* in Elder Law (2007-2014)

Listed in *Texas Monthly Super Lawyers 2004-2014* in Elder Law and Top 50 Lawyers in South and West Texas (2013).

Listed in *Scene in SA San Antonio's Best Lawyers* in Trust and Estate Law (2008-2014)

Co-Author of *Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas*, Elder Law Trio Press, Houston, 2005.

Co-Author of *Elder Law*, *Texas Practice Series Vol.. 51,* Thomson-Reuters (formerly West Publishing), 2008 to present.

Named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning (2013) by the *San Antonio Business Journal*.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS

Author, *Creating a SNT without Creating Malpractice*, State Bar of Texas Advanced Elder Law Conference, Houston, Texas, April 9, 2015.

Author, *Cracking the Entitlements Enigma Code*: *What Practitioners Need to Know about Medicaid*, Corpus Christi Estate Planners Counsel, Corpus Christi, Texas, November 20, 2014.

Author, *Auditing the MERP Claim*, Texas-NAELA Annual Fall Meeting, Fort Worth, Texas, October, 1, 2014

Author, *Medicaid Do's and Don'ts,* 2014 Medico-Legal Summit, South Texas Geriatric Education Center and the VA-GRECC, San Antonio, Texas, September 18, 2014.

Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2012 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 21, 2014.

Author, *Winding Up the Settlement: The Government Benefit Elephant in the Room,* State Bar of Texas Soaking Up Some CLE, May 15, 2014, South Padre Island, Texas.

Co-Author, *Where Real Estate and Estate Planning Collide*, State Bar of Texas, Advanced Elder Law Conference, April 3, 2014, Dallas, Texas.

Author, *Cracking the Government Benefits Enigma Code: What Estate Planners need to know about Government Benefits*; San Antonio Estate Planner's Counsel's Docket Call in Probate Court, February 21, 2014, San Antonio, Texas.

Author, *And How are the Children: Planning for Children with Special Needs Trusts*, University of Texas School of Law 2014, 10th Annual Changes and Trends Affecting Special Needs Trusts, February 6-7, 2014, Roundrock, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 24, 2014.

Author, *Special Needs Trusts,* Northeast Independent School District Continuing Education, San Antonio, Texas, October 24, 2013

Author, *The Good News/Bad News Client: Adult Protective Services issues that may arise when caring for an Elderly or Disabled individual*, University of Texas Health Science Center Medico-Legal Conference, October, 10, 2013.

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Corpus Christi Probate Conference, September 27, 2013

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Texas NAELA, Austin, Texas, September 7, 2013

Panelist, *Ask the Experts*, Estate Planning, Guardianship & Elder Law Conference, University of Texas School of Law, Galveston, Texas, August 8-9, 2013

Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2013 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2012.

Panelist, Elder Law, Disability Planning and Bioethics Group: *Current Issues Affecting Special Needs Trusts,* American Bar Association Section of Real Property, Trust and Estate Law 24th Annual Spring CLE Symposia, Washington, D.C. May 2-3, 2013

Author, *Administrative Appeals: Cutting it off at the Pass*, State Bar of Texas Advanced Elder Law Course, Houston, Texas, April 11, 2013.

Author, *Special Needs Trusts,* Northeast Independent School District Continuing Education, San Antonio, Texas, March 21, 2013.

Author, *Special Needs Trust: The Moving Target*, University of Texas School of Law 2013, 9th Annual Changes and Trends Affecting Special Needs Trusts, February 7-8, 2013, Austin, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 25, 2013.

Numerous presentations 1996 though 2012.

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What Real Estate Attorneys Need to Know about Wills (and Non-testamentary transfers) and Probate

Ignorance of the law excuses no one. And so we attend these conferences to avoid the embarrassment (if not the liability) of ignorance of the law. Several years ago I co-authored a paper with Kristen Porter, entitled the *Collision Between Real Estate and Elder Law* and during the process found several areas of real estate law that had eluded me. Surprise! Surprise!

In the next few minutes I hope to clarify laws that apply to Wills, the subsequent probate process including transfer on death deeds that are intended to avoid probate. There is no need for me to write a treatise on these issues since the treatise already exists. The author commends to you William Pargaman's 2011, 2013 and 2015 Texas Estates & Trust Legislative update found on Bill's website at www.snpalaw.com/resources.

1. Will Forms. 2015 Legislative Session, Senate Bill 512 was filed by Senator Judith Zaffarini to begin the process of creating Will forms for persons who could not otherwise afford to pay attorney fees for a Will. The background and purpose of the bill states:

> "Interested parties note that it is cost-prohibitive for many Texans to hire an attorney to draft or probate a will and point out that legal aid provides assistance to only a small portion of people in need. Accordingly, many people neglect writing a will and others self-prepare wills lacking essential language to make the will legally effective. The parties explain that when a valid will does not exist, property may be given informally to the person that the decedent wanted to have the property, but legal title does not transfer. Without legal title, disputes of co-ownership can arise and the person in possession cannot sell the property, use it as a collateral on a loan, or qualify for property tax exemptions for which the person would otherwise be eligible. To address this issue, S.B. 512 seeks to direct the Supreme Court of Texas to develop standardized forms for use in certain probate matters."[1]

Senate Bill 512 passed with the mandate that the Supreme Court create Will forms in both English and Spanish with easy to read instructions based on marital status and whether the testator had children. The Spanish version will be used for instruction unless a translation can be submitted to the court for probate. The form must include bold language stating that the form is not a substitute for engaging an attorney. "The bill requires the clerk of a probate court to inform members of the general public of the availability of a form promulgated by the Supreme Court as appropriate and to make the form available free of charge. The bill also requires a probate court to accept such a form unless the form has been completed in a manner that causes a substantive defect that cannot be

[1]Bill Analysis by the Judiciary and Civil Jurisprudence Committee Report.

cured."[2]

There are currently four states that have Will forms: California, Maine, Michigan and New Mexico.[3] In 1993, Professor Gerry Beyer[4] wrote of the inevitability of Will forms due to public demand[5] noting that it may be wise to have forms promulgated by Bar associations to allow for greater attorney input and ease of creation and revision.[6]

Potential Issues:

(1) The forms and instructions have yet to be drafted. Being involved at least in the comment on the document drafts and better yet, involved in the drafting will assure the best possible forms and instructions. Problems to avoid:

a. *Estate of Smith,* 61 Cal.App.4th 259 (1998, review denied). When Ms. Smith died, her daughter offered a holographic Will for probate that left the entire estate to the daughter and granddaughter. Subsequently, the surviving spouse offered a Statutory Will leaving the entire estate to the surviving spouse or if the spouse was deceased then to descendants to be held in trust. The statutory Will was not dated. It was witnessed in the CPA's office although the CPA had no recollection of the execution. Evidence was given at court of the Testator's long intent to leave her estate to her daughter and granddaughter. The Court denied probate to the statutory Will finding that the Testator signed the Statutory Will by mistake. "The court deemed the statutory will with trust 'confusing and misleading,' because the form would lead a lay person to believe the spouse would have the use of the decedent's assets while the spouse was alive, then they would go to the children. Hence, the court concluded the decedent's will 'clearly evidences an intent to provide her assets

[2] *Id.*

[3] Gerry W. Beyer, *Statutory Fill-In Will Forms–The First Decade: Theoretical Constructs and Empirical Findings,* 72 Oregon L.R. 769, 772 (Winter, 1993).

[4] Professor first holder of the Governor Preston E. Smith Regents Professorship, Texas Tech University School of Law.

[5] Gerry W. Beyer, *Statutory Fill-In Will Forms–The First Decade: Theoretical Constructs and Empirical Findings,* 72 Oregon L.R. 769, 827 (Winter, 1993).

[6] Gerry W. Beyer, *Statutory Fill-In Will Forms–The First Decade: Theoretical Constructs and Empirical Findings,* 72 Oregon L.R. 769, 833 (Winter, 1993).

to her husband and then to her children.'"[7] The court concluded that the statutory Will should not be admitted to probate because of the Testator's mistaken interpretation of the statutory Will's language. The Appellate Court reverse stating that mistake goes to the testamentary intent and not a misunderstanding of the law.

It is imperative that any Texas form promulgated have clear language as to the effect of the Will at the Testator's death. Beta testing would be advisable in determining if language is clear.

An old form that had been repealed was used by Testator. It may be wise to publish an easily accessible list of current and repealed forms to avoid reliance on defective forms.

b. *Estate of Perry*, 51 Cal.App.4th 440 (1996). While Testator was in the hospital, his nephew purchased a California Will form from a local office supply store, filled in the blanks and then took the completed form to the hospital where the Testator signed the Will in front of two witnesses. The Will left the majority of Testator's estate to the nephew. Six days later the testator died. The Testator's brother and sister sued to prevent the probate claiming that the Testator (1) was not competent to sign the Will, (2) that the Will did not comply with the statutory requirements for execution and (3) the execution of the Will as due to undue influence. The lower court denied probate of the Will because the Will was not properly executed. The appellate court reversed and remanded stating that the statute does not prevent someone else from filling in the blanks for the Testator. The Appellate Court did not comment on the other issues at hand.

Thus, the Texas forms should make clear who can fill in the blanks of a statutory form.

c. no Maine cases
d. no New Mexico cases
e. no Michigan cases

Why are there so few cases?

(2) Educating the general public as to any potential problems with a form.
   a. Any circumstance out of the ordinary may not be addressed on the form.
   b. You (the testator) cannot fix an oversight after death leaving intended but omitted legatees without recourse (*Estate of Smith)*.

[7] *Estate of Smith*, 61 Cal.App.4th 259, 268 (1998, review denied).

c. A Court will look at the Will and will not allow outside testimony as to intent unless the words in the Will are ambiguous.
d. Without an attorney present representing the Testator, there is potential for exploitation, undue influence, capacity issues and fraud.
e. The money saved by not engaging an attorney can be minuscule compared to the cost of trying to fix the errors along with the loss of potential legacy because of ignorance of the law or fraud.
f. Forms may not necessarily keep up with changes in case law.

Education can take the form of speaking at independent living and assisted living facilities, churches, public conferences and other public forums. Writing articles for newspapers and publications such as medical and hospital periodicals. Endorsement of these educational materials by non-attorneys will give credibility to the statements.

(3) Become the expert in resolving the legal issues that arise as a result of errors and fraud.

2. Method of transferring real property for persons who cannot afford a Will or have no funds to probate the Will - Transfer on Death Deed. 2015 Legislative Session, Senate Bill 462 was filed by Sen. Joan Huffman with the companion House Bill 703 filed by Rep. Jessica Farrar. In the same vein as SB 512, stakeholders noted that indigent persons had no means of passing title to real estate because they could not afford to engage an attorney for a Will or leave enough funds as a legacy to probate the Will. Thus, the purpose of the Transfer on Death Deed statute was to create a form that would give an individual a method of passing title to real property at death with the ability to change his mind and revoke a deed while still living.

As originally written, this legislation arguably applied to all transfer on death deeds including deeds retaining a life estate, deeds retaining a life estate with a power of appointment ("Ladybird deeds") and joint tenancy deeds.

Section114.003 of the proposed statute stated "This chapter applies to a transfer on death deed made **before**, on or after September 1, 2015 by a transferor who dies on or after September 1, 2015." The Transfer on Death Deed statute contains a form of deed but if the law was to apply *before* the effective date of the new statutory form, then the only interpretation would be to apply the terms of this new statute to transfer on death deeds signed before the effective date. This retroactive application of the statute would call into question all transfer on death deeds for persons still living.

Section §114.052 of the proposed statute made a transfer on death deed revocable **regardless of whether the deed or another instrument contains a contrary provision.**

Section §114.054 of the proposed statute stated that the grantor had to have capacity to sign a contract in order to sign a transfer on death deed although the ToDD is supposed to be substitute for Will.

Section §114.103(d) of the proposed statute stated that "**A transfer on death deed transfers real property without covenant or warranty of title even if the deed contains a contrary provision."**

And there was some concern that Section §114.106 "Liability for Creditor Claims and Family allowances" could extend Medicaid Estate Recovery to non-probate assets. Currently, Medicaid Estate Recovery is limited to the probate estate.[8]

As an Estate Planner and Elder Law Attorney, the author had great concerns that this statute might have unforeseen consequences on existing transfer on death deeds and specifically on Ladybird deeds.[9] Let me assure you that you can make a difference by testifying at the Senate and House hearings on the statute. The legislators listen to comments and genuinely try to fashion the most effective legislation based on input from stakeholders. Subsequently SB 462 was amended. In the final version of the law, the word "***before***" was removed from the statute. Clarifying language was added in §114.002(a)(6) stating: "'Transfer on death deed' means a deed authorized under this chapter **and does not refer to any other deed that transfers an interest in real property on the death of an individual."** And finally, §114.106(b) was added clarifying that this statute does not affect or extend Medicaid Estate Recovery. "..., real property transferred at the transferor's death by a transfer on death deed is not considered property of the probate estate for any purpose, including for purposes of §531.077, Government Code." Section 531.077 of the Government Code is the Medicaid Estate Recovery implementation statute.

The intent of this ToDD statute was to create a way in which an indigent person could pass title to real estate without the costs of a Will and the expenses of probate. It was never meant to affect any existing transfer on death deed. The form addresses divorce, creditor issues and revocation and includes a ToDD form as well as a revocation form. A deed executed pursuant to the statute is a deed without warranty regardless of the language in the deed and the Grantor must have capacity to sign a contract when executing the deed even though this deed is intended to be a testamentary substitute. Some stakeholders testifying during the hearing process suggested that an agent named in a durable power of attorney should not be allowed to sign this deed. However, the final statute did not include any limitations for execution by an Agent. The effective date of the statute is September 1, 2015.

Potential issues:

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[8] 1 T.A.C. §373.201.

[9] "Ladybird deed" is a reference to a deed conveying an interest in real property, retaining a life estate along with a right to sell the property and keep the proceeds, thus cutting off the remainderman. The Medicaid for the Elderly and Persons with Disabilities Handbook §_____ recognizes the Ladybird deed as a permissible means of avoiding Medicaid Estate Recovery by passing real estate outside of probate.

(1) It will be interesting to see if title companies require additional documentation such as proof of capacity when this statutory deed is in the chain of title.

(2) Education of the general public as to the unexpected outcomes is imperative.
   a. Any circumstance out of the ordinary may not be addressed.
   b. Mistake as to the effect of the law does not affect the validity of the deed. A Court will look at the deed and will not allow outside testimony as to intent unless the words in the deed are ambiguous.
   c. Without an attorney representing the Grantor, there is potential for exploitation and fraud.
   d. The money saved by not engaging and attorney can be minuscule to the cost of trying to fix the errors along with the loss of potential legacy because of ignorance of the law or fraud.

Education can take the form of speaking at independent living and assisted living facilities, churches, public conferences and other public forums. Writing articles for newspapers and publications such as medical and hospital periodicals. Endorsement of these educational materials by non-attorneys will give credibility to the statements.

(3) Become the expert in resolving the legal issues that arise as a result of errors and fraud.

3. Speaking of a Ladybird deed, the purpose of drafting this transfer on death deed is to pass property outside of probate without incurring a Medicaid Transfer penalty. The author cannot miss this opportunity to touch on Medicaid's right of recovery against the probate estate.

In **1987** the Texas Legislature attached the estate recovery law as an amended to a statute reorganizing a governmental department. The law allowed the State of Texas to place a lien on the home of a Medicaid recipient in order to obtain reimbursement for state Medicaid expenditures made on behalf of the recipient. Ultimately, the law met with so much opposition from Texas residents that the legislature repealed it in the following **1989** legislative session. So until 2003, Texas had no Medicaid Estate Recovery Statute.

Medicaid is a federal-state cost sharing program. States that participate in the Medicaid programs receive federal dollars but must also contribute State dollars as a condition of participating in the programs. Thus, Medicaid is governed by federal law with states creating the rules to enforce the federal laws. All rules are subject to federal scrutiny and approval as a condition of receiving federal Medicaid funding. However, since the states are able to fashion rules subject to federal guidelines, there are 50 sets of rules.

In the Federal Medicare Catastrophic Coverage Act of 1988 ("MCCA") Congress addressed the issue of Estate Recovery; however, the MCCA did not make estate recovery mandatory. The legislative history clearly sets out the mandate of Medicaid Estate Recovery:

> "The purpose of the Committee bill is to deter those who, through 'gifting' or other disposal, knowingly seek to shelter assets from dissipation due to nursing home costs. The bill is not intended to penalize those who inadvertently, or through lack of sophistication, did not receive adequate compensation. **Nor is the bill intended to deny eligibility to those who transfer resources to relatives or others by way of compensation for the informal care which these individuals have given to the applicant or beneficiary; the imposition of a penalty in such circumstances would have the unfortunate effect of discouraging family members and friends from caring for the frail elderly or disabled and helping them remain independent for as long as possible."** House Report No. 100-105(kk) 1988 U.S. Congress and Adm. News, p. 803, 897.

In the Federal Omnibus Budget Reconciliation Act of 1993, Medicaid estate recovery became mandatory to all states. Yet, after the 1987 Medicaid lien fiasco, the Texas Legislature resisted implementation of estate recovery for ten years. As one of the three last states to enact Medicaid Estate Recovery, Texas passed a law in 2003 fulfilling its obligation under the 1993 federal law. On June 10, 2003, Governor Perry signed House Bill 2292, allowing the State of Texas to recover payments made on behalf of a person who receives Medicaid benefits.[10] The law effecting estate recovery was brief:

> "SECTION 2.17. Subchapter B, Chapter 531, Government Code, is amended by adding Section 531.077 to read as follows: Sec. 531.077. RECOVERY OF MEDICAL ASSISTANCE. (a) The commissioner shall ensure that the state Medicaid program implements **42 U.S.C. Section 1396p(b)(1)**. (b) The Medicaid account is an account in the general revenue fund. Any funds recovered by implementing 42 U.S.C. Section 1396p(b)(1) shall be deposited in the Medicaid account. Money in the account may be appropriated only to fund long-term care, including community-based care and facility-based care.

The federal law in the noted section 42 U.S.C. §1396p(b)(1) is a creditor statute,[11] requiring a state to recover expenditures from the estate of a deceased person who received Medicaid benefits--thus the name "estate recovery." It is important to note that the Texas legislature chose (b)(1) of the

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[10] Governor Perry stated that if the Medicaid Estate Recovery provision had been a stand-alone bill, he would have vetoed it. But since it was in a larger piece of legislation that was desirable, he signed the bill. Robert T. Garrett, Dallas Morning News, published June 13, 2003.

[11] "(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of— (I) nursing facility services, home and community-based services, and related hospital and prescription drug services,…" *See also,* 1 T.A.C.. §373.103.

federal law to implement as opposed to (b)(2), the lien statute. The Texas Legislature was very careful to avoid the controversy created in 1987 **and thus the 2003 legislation clearly is not a lien statute**.

The federal statute does not set out the rules for estate recovery--leaving the rule making to the Commissioner of the Texas Department of Health and Human Services ("HHSC") heading up the State Medicaid program. Federal law does set out basic requirements along with guidelines and options in the law and in Section 3810 of the Federal State Medicaid Manual. Upon passage of the Medicaid Estate Recovery Statute, the Texas Legislature sent a strong message to the HHSC rule maker to make rules that would be lenient yet comply with the federal legislative intent noted above. In compliance with that mandate, HHSC ultimately fashioned rules that would limit Medicaid estate recovery to the "probate estate" of a deceased Medicaid beneficiary, thus clearly allowing for assets to pass outside of probate to avoid Medicaid Estate Recovery. The State complied with the federal law but respected its history of protecting families and their needs as they age. Thus, it is not against public policy to plan to avoid Medicaid Estate Recovery. In fact, it was anticipated by the State Legislature as well as Congress.[12]

Under the Regulations promulgated pursuant to the enactment of the Medicaid Estate Recovery law, the State is a Class 7 unsecured creditor as described in Texas Estates Code §355.102,[13] just above VISA, Sears, and all other unsecured Class 8 creditors. As an unsecured creditor, an executor or an administrator can send permissive notice to the creditor pursuant to Texas Estates Code §§403.056 & 308.054 and if the State fails to comply with the Estates Code requirements within four months of notice, the State will lose its right to recover from the Estate. However, other than §§403.056 & 308.054 of the Texas Estates Code, it is the author's opinion that there is no statute of limitations barring the State's right to recover.[14]

Basic debtor-creditor law provides that there is a contract between the debtor and creditor. A breach of contract—failure to pay the debt—allows the creditor to sue the debtor on the debt but until a judgment is received and abstracted, no lien arises to attach to the property. Thus, a creditor of the seller would have no claim against the buyer of real property owned by the Estate because there is no lien against the property. Thus, there would be no claim against the title insurance

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[12] Congress allows states to opt into a very lenient form of estate recovery as evidenced by the rules approved in Texas. The Texas Department of Aging and Disability Services Reference Guide (2006) states: "MERP was written into Texas law as part of House Bill 2292, passed in 2003 by the 78th Regular Session of the Texas Legislature. As the state's Medicaid agency, the Health and Human Services Commission was responsible for developing the program requirements. The MERP rule finalized in the Texas Administrative Code in December 2004, was fashioned as a very lenient program within the federal parameters." p.19.

[13] The Rules found in Chap. 373 of the Texas Administrative Code still refer to Texas Estates Code §355.102.

[14] State v. Durham, 860 S.W.2d 63 (Tex. 1993).

because the creditor only has a contractual claim against the buyer, not a secured claim against the real estate. The author found no cases that allowed an unsecured creditor to assert a claim against property without a lien. In fact, in one case, where a creditor took possession of debtor's property, sold it and retained the proceeds to pay a valid debt, the Court held that without a lien right, the creditor had converted the property and was liable to the debtor for damages, regardless of a valid unsecured debt.[15]

Ultimately the State has no right to file a lien or lis pendens or any other right against the real property of a deceased Medicaid recipient unless a judgment is taken and such judgment is abstracted as required for any creditor. The State's right to recover is limited to the same rights as any other unsecured creditor. As an unsecured creditor, the State must prove up the debt and if the State is unable to prove up a valid debt, then as with any unproven debt, the executor, administrator or heir must reject the claim Executors owe a fiduciary duty to the beneficiaries of the estate.[16] An executor/administrator has no fiduciary duty to unsecured creditors.[17] Texas Estates Code §403.051 provides that the Independent Executor shall approve, classify and pay or reject claims according to Texas Estates Code §355.102 Classification of Claims against Decedent's Estate. If a claim is not paid, Texas Estate Code §403.059 provides that the appropriate method of collecting the claim is by suit against the independent executor. Additionally, if the specific property inherited has been sold, the distributees can be held personally liable for the value of the property received.[18]

"A personal representative may be held personally liable for damages to an estate or its heirs or beneficiaries for the value of estate property lost or damaged due to the representative's failure to properly carry out his or her duties." Texas Estates Code §351.151. Any interested person may file suit against the representative for breaching his or her fiduciary duty. Texas Estates Code §351.151. Both the personal representative individually and his or her surety, if any, can be held liable for the resulting damages. Texas Estates Code § 351.151."[19] Thus, an executor must audit any claim against Estate assets made by the State under the Medicaid Estate Recovery Program. The State must fulfill nine requirements according to the Texas Administrative Code in order to have a

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[15] *Jones v. City Nat. Bank*, 166 S.W. 442 (Tex.Civ.App. –Ft. Worth 1914, writ granted with no additional writ history)

[16] See, e.g., *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (fiduciary duty of bank arose because it was executor of estate)

[17] *Mohseni v. Hartman,* 363 S.W.3d. 652 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.).

[18] C. Boone Schwartzel, *Unsecured Claims and MERP Claims in Probate"* State Bar of Texas Advanced Elder Law Course, April 2010, Dallas, p. 7-8 citing to *McFarland v. Shaw*, 45 S.W.2d 193 (Tex.Comm'n App. 1932, holding approved).

[19] Nichols, Webb & Klein, *Fiduciary Litigation*, State Bar of Texas Advanced Family Law, 2011, San Antonio, p. 55,

valid claim for debt against the Estate.[20] The State has the burden of proof that it has complied with the law. Paying Medicaid Estate Recovery claim without properly auditing the claim, is in the Elder Law author's opinion, a breach of the Executor's fiduciary duty to the beneficiaries. It is the author's further opinion that the executor would be liable to the beneficiaries to the extent of any improper payment to the State and any other creditor.

Because it was not against public policy to avoid Medicaid Estate Recovery, attorneys began transferring the homestead (the only significant asset in the Medicaid Recipient's estate) to pass outside of the probate estate. There are two ways in which to affect the transfer: through a deed conveying title but retaining a life estate in the property with the power of appointment and as a joint tenant with rights of survivorship. The Ladybird deed is an acceptable method of passing real estate outside of probate.[21] Transferring property to someone owning the property as a Joint Tenant with rights of survivorship has not been favored by the Medicaid Agency although if transferred pursuant to the new Transfer on Death Deed statute could be an acceptable method. Transferring real property to a revocable trust will disqualify an individual for most Medicaid programs.[22]

Potential issues:

(1) Because other states have Medicaid Estate Recovery lien statutes, title companies may be confused as to the State's status as a creditor.

When any title company issues arise with regard to Medicaid Estate Recovery, try to resolve the issues by speaking to the attorney for the Underwriter.

(2) If possible, obtain a release of any Medicaid Estate Recovery claim prior to listing the estate property for sale or opening an administration of the Estate.

Resolve any Medicaid Estate Recovery claim issue prior to instituting an estate administration. The Texas Administrative Code authorizes the State to communicate with not only the estate representative but also a person named in a Durable Power of Attorney, Medical Power of

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[20] The state must satisfy the threshold notice requirements of 1 T.A.C. §373.305, the 30 day notice requirement in 1 T.A.C. §373.307(a) and the 70-day claim filing requirement in 1 T.A.C. §373.205(b).

[21] The Glossary of the Medicaid for the Elderly and Persons with Disabilities Handbook ("MEPD") states: "Enhanced Life Estate Deeds — A legal document (sometimes known as a Lady Bird Deed) in which one transfers property to their heirs while at the same time retaining a life estate with powers including the right to sell the property in their lifetime. Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. If you see a document that appears to transfer property to heirs while retaining a life estate with powers, contact the regional attorney to determine the value of any transfer. The full value of the asset is treated as a countable resource to the individual, unless it is a resource that is otherwise excluded, such as a home to which the individual intends to return. All Enhanced Life Estate Deeds must be reviewed by the regional attorney."

[22] MEPD F-3210.

Attorney or any person who had communicated with the Texas Health & Human Services Commission or Texas Department of Aged and Disability Services.[23]

4. **Reformation of Will** (Texas Estates Code §§ 255.451-255.455). The 2015 Legislature passed a Decedent's Estates bill that included a new Subsection J setting out the method for reformation of a Will that includes:

> "(1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;
>
> (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or
>
> (3) the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent." §255.451(a)

Of course, the court will have discretion to either grant or deny the petition. This statute does not create or imply that the personal representative has a duty to act under the statute. But the statute can be applied retroactively. "The court may direct that an order described by this subchapter has retroactive effect." §255.453.

Potential issues: Make sure forms are updated to comply with this statute.

5. More non-testamentary transfers. In a case styled *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App.—Austin 2011, no pet. h.), the Court held that Michigan law would prevail over a Texas resident's ownership of an investment account. The 2013 Legislature changed this outcome by providing that if the Texas resident contributed more than 50% of the investment, then Texas law prevails. (Texas Estates Code §§111.051(7) & 111.054)

In another case styled *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009), the Texas Supreme Court held that community property held in an account styled "Joint Tenant" was sufficient to create a right of survivorship. Then in 2011, the Texas Legislature reversed Holmes by statute clarifying that singular language of "Joint Tenancy" ownership does not create a right of survivorship. Texas Probate Code §§439 & 425(c).

Potential issues: Obtain copies of all financial signature agreements to verify ownership and potential conflicts of law issues.

6. Foreign Wills and self-proving affidavits. The Texas Legislature has passed changes to the probate of foreign wills in the last three legislative sessions. In 2011 and 2013, the self-proving affidavit to a foreign Will is sufficient if the affidavit meets certain guidelines (Estates Code §256.152). Then again in 2015, the Legislature further amended Estates Code §256.152(b) & (c) in Section 24 of SB 995, as follows:

[23] 1 T.A.C. § 373.303

(b) A will that is self-proved as provided by Subchapter C, Chapter 251, that [~~or, if executed in another state or a foreign country,~~] is self-proved in accordance with the law [~~laws~~] of another [~~the~~] state or foreign country where the will was executed, as that law existed at the time of the will's execution, or that is self-proved in accordance with the law of another state or foreign country where the testator was domiciled or had a place of residence, as that law existed at the time of the will's execution or the time of the testator's death, [~~of the testator's domicile at the time of the execution~~] is not required to have any additional proof that the will was executed with the formalities and solemnities and under the circumstances required to make the will valid.

(c) As an alternative to Subsection (b), a will [~~executed in another state or a foreign country~~] is considered self-proved without further evidence of the law of any [~~the other~~] state or foreign country if:

(1) the will was executed in another state or a foreign country or the testator was domiciled or had a place of residence in another state or a foreign country at the time of the will's execution or the time of the testator's death; and

(2) the will, or an affidavit of the testator and attesting witnesses attached or annexed to the will, provides that:

(A) [~~(1)~~] the testator declared that the testator signed the instrument as the testator's will, the testator signed it willingly or willingly directed another to sign for the testator, the testator executed the will as the testator's free and voluntary act for the purposes expressed in the instrument, the testator is of sound mind and under no constraint or undue influence, and the testator is eighteen years of age or over or, if under that age, was or had been lawfully married, or was then a member of the armed forces of the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service; and

(B) [~~(2)~~] the witnesses declared that the testator signed the instrument as the testator's will, the testator signed it willingly or willingly directed another to sign for the testator, each of the witnesses, in the presence and hearing of the testator, signed the will as witness to the testator's signing, and to the best of their knowledge the testator was of sound mind and under no constraint or undue influence, and the testator was eighteen years of age or over or, if under that age, was or had been lawfully married, or was then a member of the armed forces of the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service.

Section 24 of SB 995, applies "only to an application for the probate of a will or administration of a decedent's estate that is filed on or after the effective date of this Act [September 1, 2015]. An application for the probate of a will or administration of a decedent's estate filed before that date is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

7. **2011 Will execution revisions**. Since 2011, Wills can be executed by the Testator just one time following the self-proving affidavit or the Will can be executed in the traditional manner at the end of the Will and again on the self- proving affidavit. (Probate Code §59(a-1))

8. **Pretermitted Child**. A pretermitted child is defined as a child who comes into being after a will is executed and the will is silent as to any legacy for the later born child. As noted in William Pargaman's treatise on the 2011 legislation, "Professor Stanley Johanson brought the following hypothetical to the Bar's Real Estate, Property, Trusts and Litigation counsel's attention, taken from one of his law school exams (edited for brevity): *Harvey and Lucille were married, lived in Dallas, and had no children. In 2000, Harvey executed a will that gave all of his property to Lucille. In 2002, Harvey had an affair with Blaze Starr, resulting in a son: Curly. While threatening divorce, Lucille decided to stick with Harvey. Harvey died in 2005 without changing his will. Harvey had separate personal property of $300,000 and an interest in a community estate of $600,000. What are Curly's rights, if any?* Under [the old] Probate Code §67(a)(2), because Harvey had no children when he executed his will, Curly succeeds to an amount equal to what he would inherit if Harvey had died intestate and unmarried, "owning only that portion of his estate not devised or bequeathed to the **parent** of the pretermitted child." Since the other parent of the child was Blaze and Harvey had understandably given nothing to her in his will, Curly gets Harvey's entire estate, leaving Lucille with only her half of the community property, and none of Harvey's estate. Prof. Johanson questioned whether this was the appropriate result when Curly would have taken nothing had he been born to Lucille. Thus, in 2011, the pretermitted child statute was revised to provide for Curly, limited to a maximum of one-half of the decedent's estate if the Will devised the entire estate to the non-parent spouse. Examples set out in Johanson are instructive:

> 1. H executes a will that bequeaths 3,000 shares of IBM stock "to my children, Ann and Bill," devises his 1,000 acre separate property ranch to his brother Bob, and the rest of his estate to his wife W. Thereafter, H and W have a child Celia, and then H dies without having revised his Will Under the statute, Celia's share of the estate is limited to the bequest of the IBM stock to the other children and each child ends up with 1,000 shares. Brother Bob takes the ranch and W gets the residuary estate.
>
> 2. Consider the same facts as Example 1 above, except that H's will made no bequest to Ann and Bill. W takes the residuary estate as she was the pretermitted child's other parent. O the devise of the ranch to brother Bob is affected by the pretermitted child statute. If H had died intestate, unmarried and owning only the ranch, Celia's intestate share would be one-third (as H let 3 children). Therefore Celia takes one-third of the ranch under §255.053, and Bob takes two-thirds under the Will.
>
> 3. W who has no children executes a will that devises her estate to her husband H and her sister S in equal shares. Two years later, W and H adopt C; then W dies without having changed her will. W and H owned community property worth $300,000 and W owned separate property worth $120,000. The bequest to H is not diminished by the pretermitted child statute because he was C's parent. H takes half of W's one-half community interest and half of W's separate property. C takes the remaining property trumping the will provision in favor of W's sister as C would have been W's sole heir under §201.001 if W had died intestate and unmarried.
>
> 4. As to Curly, since the surviving parent is not the testator's surviving spouse, the amount passing to the pretermitted child may not reduce the amount

passing to the spouse by more than one-half. Thus, Curly would take one-half of H's estate and the other one-half would pass under Harvey's will to Wanda. Estates Code §255.056.

Potential issues: Determining ownership of property, including real estate, is now changed since the 2011 legislation. While title companies will most certainly have this issue resolved, it is important for the Independent Executor to clearly determine ownership to property when drafting an executor's deed.

9. **No statute of limitation for a determination of heirs** (Estates Code §202.0025). In a case styled *The John G. and Marie Stella Kenedy Memorial Foundation v. Fernandez*, 315 S.W.3d 515 (Tex. 2010), the Texas Supreme Court stated: "The discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments. When an heirship claim is brought after an administration of the decedent's estate or a conveyance of the decedent's property to a third party, courts have applied the four-year residual limitations period of Texas Civil Practice and Remedies Code section 16.051. *See, e.g., Cantu v. Sapenter,* 937 S.W.2d 550, 552 (Tex.App.-San Antonio 1996, writ denied); *Smith v. Little,* 903 S.W.2d 780, 787–88 (Tex.App.-Dallas 1995), *rev'd in part on other grounds,* 943 S.W.2d 414 (Tex.1997)." Based on the passage of more than four years, the Supreme Court affirmed the lower court finding that Fernandez had no claim against the Kennedy Estate. The 2013 Legislature reversed the holding in *Kenedy,* and enacted Estates Code §202.0025 that states: "Notwithstanding Section 16.051, Civil Practices and Remedies Code [four year statute of limitations], a proceeding to declare heirship of a decedent may be brought at any time after the decedent's death."

Potential issues: The Court in *Cantu v. Sapenter* stated: "In weighing the state's interest in protecting clear title and preserving the effective administration of estates, we find that there must be some limits put on those making an heirship claim. See Reed, 476 U.S. at 855, 106 S.Ct. at 2237; Smith, 903 S.W.2d at 788; Turner, 848 S.W.2d at 877." However, *Sapenter* was effectively overruled by Estates Code §202.0025.

10. **Power of sale by Order** (Estates Code §401.006) Texas Estates Code §401.006 gives an Independent representative the ability to include the power of sale in an estate administration when the Will is silent if beneficiaries consent. The original statute gave the power of sale of real property under this statute. In 2013, the Texas Legislature amended the statute extending the power of sale to all property, not just land.

11. **Authenticated Claims in an Independent Administrations** (Sec. 403.056). In the 2013 Legislative session, the Legislature revise the method in which a creditor must respond to the optional notice to creditors made under Estates Code §§ 403.052 and 403.055. A creditor who received the Section 308.054 optional notice can either sue on the claim or present notice to the independent representative in a written instrument that complies with the authenticated claims found in Estates Code §355.004. So if a creditor responds by filing a claim, the claim must:

a. be supported by an affidavit that states:

(1) that the claim is just;

(2) that all legal offsets, payments, and credits known to the affiant have been allowed; and

(3) if the claim is not founded on a written instrument or account, the facts on

which the claim is founded.

b. A photostatic copy of an exhibit or voucher necessary to prove a claim may be offered and attached to the claim instead of attaching the original.

Potential issue: The state of Texas is an unsecured creditor for certain medicaid payments[24] that arose after the individual turned age 55.[25] It is crucial for the Estate representative to properly audit the claim to make sure that the claim is valid as with any other creditor claim.

[24] 1 T.A.C. §373.301

[25] 1 T.A.C. §373.103