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MEDICAID-FRIENDLY ESTATE PLANNING

H. Clyde Farrell
Bliss Burdett

Author contact information:

H. Clyde Farrell
Bliss Burdett
Farrell, Johnson & Burdett PLLC
1000 Mo-Pac Circle
Austin, TX 78747
cfarrell@txelderlaw.com
bpak@txelderlaw.com
512-323-2977

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Medicaid-Friendly Estate Planning

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I. USING DEEDS TO AVOID MEDICAID ESTATE RECOVERY

A. LADY BIRD DEED OVERVIEW

The "Enhanced Life Estate" or "Lady Bird" Deed adds to the reservation of a life estate, the reservation of the power to take away from the remainder owner(s) the rights given them in the deed and give those rights to someone else, as well as the right to sell without liability to the remainder beneficiary.[1]

> At common law, an estate in remainder, expectant on the death of the grantor, could not be created, but in this state, by virtue of a special statutory provision, an estate in land may be created by deed to commence in the future. The grantor's death may be designated as the time when the estate is to fall into possession. Upon such death, a complete title, in the sense of a right of present enjoyment, becomes vested in the grantee, unless the right to make other disposition of the property has been reserved by the grantor.[2]

The statute in question is Texas Property Code §5.041: "A person may make an inter vivos conveyance of an estate of freehold or inheritance that commences in the future, in the same manner as by a will."

The validity of the reservation of the right to revoke the grant of such a future interest was affirmed recently, when the grantee of such a deed argued that a later conveyance by the grantor to a Limited Liability Company was ineffective. The Texarkana Court of Appeals rejected that argument, holding that the grantor "reserved her rights in the Property (including the right to convey it) thereby eviscerating any rights or interests [the grantee] may have had in the Property prior to that time."[3]

Practice Tip: Title companies sometimes require that grantees of an Enhanced Life Estate Deed join in any sale by the grantor. However, that may be resolved by negotiation or by finding another title company without that requirement; and the Turner *case will be helpful in that effort.*

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[1] For a more comprehensive discussion of the Enhanced Life Estate Deed and other real estate issues affecting Medicaid eligibility, see Kristen Quinney Porter & Patricia A. Sitchler, *Where Real Estate and Estate Planning Collide*, State Bar of Texas 2014 Advanced Elder Law Course.

[2] *Davis v. Zeanon,* 111 S.W.2d 772, 773 (Tex. Civ. App.-Waco 1937, writ refused); and see *York v. Boatman,* 487 S.W.3d 635, 641 (Tex. App.-Texarkana 2016, no pet.)

[3] *In re Estate of Turner,* No. 06-17-00071 (Tex. App.—Texarkana 2017, pet. denied).

Another basis for affirming the validity of interests passing under an Enhanced Life Estate Deed is Estates Code §111.052(a) (formerly in Probate Code §450), which provides, "This code does not invalidate…(1) any…conveyance of property…effective as a contract, gift, conveyance or trust, stating that:… (A) money or other benefits under the instrument due to or controlled by a decedent shall be paid after the decedent's death, *or property that is the subject of the instrument shall pass, to a person designated by the decedent in the instrument…(b) A provision described by Subsection (a)(1) is considered nontestamentary*." (emphasis added) Thus, cases invalidating conveyances passing at death as "testamentary" and ineffective because the instrument did not include two witnesses and other requirements of a will are inapplicable.

An Enhanced Life Estate Deed has the following benefits in addition to the benefits of reserving a life estate:

- If a remainder owner displeases the grantor, his or her interest can be taken away.
- Other family members may be rewarded for helping the client by a change of estate plan implemented simply by signing and recording a new Transfer on Death Deed.
- Likewise, if someone in the family falls on hard times an needs extra help, the estate plan can be changed with a new deed. As discussed below, if disability is involved, the grantee probably should be a trust, to protect potential Medicaid and other means-tested benefits and/or to provide for management of the property.
- The grantor reserves the right to sell or mortgage the property without consent of the grantee.
- If creditors of a remainder owner threaten action affecting the property, the grantor can protect his or her interests by appointing the remainder to someone else. This would not be a fraudulent transfer if the life tenants are not "debtors" as to the creditors.[4]
- Of most interest to this discussion, under the policy cited next below, the conveyance creates no Medicaid transfer penalty; and at the death of the grantor, title will pass under such a deed outside the grantor's probate estate and will therefore not be subject to Texas estate recovery under the current state law.

The Medicaid for the Elderly and People with Disabilities Handbook provides as follows:[5]

> Transfer of the person's home does not result in a penalty when the title is transferred to the person's…children, siblings, etc., if the deed is an enhanced life estate [sic] and has been approved by the regional attorney…

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[4] Tex. Bus. & Comm. Code §24.005.

[5] Medicaid for the Elderly and People with Disabilities Handbook I-3100. See also State Medicaid Manual §3258.9A. The mention of particular family relationships in the Handbook is apparently to give examples only, as nothing in the law requires that the grantee have any particular relationship to the Medicaid applicant. In fact, as discussed below, the grantee often should be a trustee.

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