

Medicaid Planning or Medicaid Avoidance?

University of Texas School of Law: 26th Annual Estate Planning, Guardianship & Elder Law Conference

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Medicaid Planning or Medicaid Avoidance?

Ethics: Competence, Diligence, Loyalty

- Guardian held liable for selling ward's home to pay for care that Medicaid would have paid for
- Attorney's license suspended 6 months for failing to put Special Needs Trust in a will, so beneficiary lost Medicaid
- But some clients are better off paying their own way
- And what "better off" means depends on the *client's* values
- Our responsibility: present all the options clearly, so the *client* can the best decisions for them

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Client Capacity and Gifting

- An agent generally cannot make gifts without express authority in the power of attorney.
- *Natho v. State*: 25-year sentence for agent making transfers to himself under power of attorney

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Why We Don't Discuss Medicaid Avoidance Enough

- Learning to do Medicaid planning takes several years
- Learning to do cash flow projections takes time also
- Medicaid *avoidance* is hard to sell—most people want someone else to pay for their medical care
- When you do sell it, you don't get paid well (financially)

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Why Avoid Medicaid: “Medical Necessity” Requirement

- The Requirement: At least LVN-level care in an institutional environment
- The Risk: Don’t strip them of their savings just when they need the money most!

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Why Avoid Medicaid: Getting Better Care

- Since 1997, Medicaid programs have not been required to pay the reasonable cost of nursing facility care—so most do not.
- Most years Texas pays about 81% of the cost of nursing home care
- That is about 2/3 of the *private-pay rate*.
- Result: Private-pay residents pay a tax on getting old and sick—if they are in facilities with Medicaid beds
- ...a tax that you don’t have to pay if you pay privately in an Assisted Living Facility or in a nursing facility with few or no Medicaid beds

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