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MEDICAID PLANNING OR MEDICAID AVOIDANCE?

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I. INTRODUCTION

This article begins with the premise that an ethical approach requires presenting to the client the full range of relevant considerations. If the client is planning for long-term care, that requires careful consideration of the costs and benefits of the care that may be needed and the client's resources for paying the cost. If the client can readily pay for any reasonably foreseeable level of long-term care, then the irreducible risks and costs of transfers and other Medicaid strategies loom much larger. Medicaid nursing home care is almost always the cheapest solution, and therefore it is often the focus of clients and family members at the first conference. In appropriate cases, we can sometimes do our clients a great service by identifying other care settings and other ways of paying for the care.

This is an updated and revised version of the author's article by the same name for the State Bar of Texas Advanced Elder Law Course in 2020. Publication names in blue print and underlined are hyperlinks to the full text on the internet.

II. THE ETHICS OF MEDICAID PLANNING

This introductory discussion will focus on ethical rules and considerations pertaining to an attorney's advice regarding transferring assets, and making other financial changes, to qualify for Medicaid and other means-tested benefits.

A. THE REQUIREMENTS OF COMPETENCE, DILIGENCE & LOYALTY

It is the client's philosophy regarding public benefits, not the attorney's, that should govern. "There is no question that the use of ... Medicaid planning by competent persons is permissible and that proper planning benefits their estates." *Matter of Klapper*, NYLJ , Aug. 9, 1994, p. 26, col. 1 (Sup. Ct., Kings County). Tax lawyers do not exhort their clients to decline tax benefits they (the lawyers) do not think are in the public interest. Public benefits lawyers cannot behave differently. To do so, or to advise incorrectly that planning would not be effective, would be inconsistent with the ethical requirements of competence, diligence and loyalty and to invite litigation for negligence or breach of fiduciary duty. In *In re Guardianship of Connor*, 525 N.E. 2d 214 (Ill. App. 1988), a guardian was held liable for damages for selling the ward's home and spending the proceeds on nursing home care, when the home was an exempt resource under Medicaid law. See also Texas Disciplinary Rules of Professional Conduct Rule 1.01, "Competent and Diligent Representation."

A Maine attorney received a six-month suspension of his license for, among other omissions, failing to include a Supplemental Needs Trust in a client's will that would have avoided disqualifying the beneficiary for Medicaid. *Board of Overseers of the Bar v. Ralph W. Brown*, Esq, Docket No. Bar-01-6 (Maine, October 25, 2002), full text at www.courts.state.me.us/opinions/documents/Bar-01-6%20Brown.htm. A Kansas attorney suffered public censure for failing to protect assets with a trust that if properly established could have shielded the assets from being counted by Medicaid as "resources." *In the Matter of Myers* (Kan., No. 95,132, Feb. 3, 2006).

Likewise, it is not appropriate for an attorney to insist that a client apply for a benefit he or she does not want for strictly philosophical reasons, after full disclosure by the attorney of the client's rights.

In general, the attorney should bring to the client's attention the full range of relevant considerations. Fordham University's 1993 Conference on Ethical Issues in Representing Older Clients resulted in the following recommendation for practice guidelines regarding "divestment of assets" of a client for the purpose of achieving Medicaid eligibility. *Proceedings of the Conference on Ethical Issues*

in Representing Older Clients, 62 FORDHAM L. REV. 1063 (1994), reprinted in The Criminal Statute: Understanding the Statute and Legislative Process, course materials (Tab 1) for the 1997 Advanced Institute of the National Academy of Elder Law Attorneys.:

In representing clients where divestment of assets is or may be considered, the attorney should:

- Counsel clients about the full range of long-term care issues, options, consequences, and costs relevant to the client's circumstances;
- Endeavor to preserve and promote dignity, self-determination, and quality of life of the elderly client in the face of competing interests and difficult alternatives; and
- Strive to ascertain the client's fundamental values in order to be responsive to the goals and objectives of the client.

That is consistent with Rule 2.01 of the *Texas Disciplinary Rules of Professional Conduct*, which largely mirrors Rule 2.1 of the American Bar Association's *Model Rules of Professional Conduct* and its Comments:

> **Rule 2.01. Advisor**
> In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
> **Comment:**
> **Scope of Advice**
> 1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
>
> 2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

B. CLIENT CAPACITY AND GIFTING

Under Texas law, an agent under a durable power of attorney generally cannot make gifts of the principal's assets without specific gifting powers. *Gouldy v. Metcalf*, 12 S.W. 830 (Tex. 1889); but see *Hanna v. Ladewig*, 11 S.W. 133 (Tex. 1889) and other cases cited in a note arguing that this is not always the case, at 33 Real Estate, Probate & Trust Law Reporter 42 (October 1994). Even if HHSC did not question such a gift, it would leave the agent--and the attorney--wide open to charges of exploitation by family members or other observers. An agent was convicted by a Llano County jury of misapplication of fiduciary property for making transfers to himself for Medicaid purposes under a valid durable power of attorney in which he was named as agent. He was sentenced to twenty-five years imprisonment, which was upheld on appeal. *Natho v. State*, No. 3-11-00.498-CR (Texas Civ. App.—Austin 2014) (unpublished but available here).

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